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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF AITKIN, COUNTY OF BENTON, COUNTY OF SHERBURNE, COUNTY OF CROW WING, COUNTY OF ISANTI, COUNTY OF KANABEC, COUNTY OF MILLE LACS, COUNTY OF MORRISON, COUNTY OF PINE,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, FOND DU LAC BAND, ST. CROIX BAND, LAC DU FLAMBEAU BAND, BAD RIVER BAND, SOKAOGON CHIPPEWA COMMUNITY, RED CLIFF BAND, AND LAC COURTE OREILLES BAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A treaty with the Chippewa in 1837 ceded over 13 million acres of land now in the State of Minnesota. Article 5 temporarily granted a "privilege of hunting, fishing, and gathering the wild rice . . . during the pleasure of the President. . . . " In 1850, President Zachary Taylor issued an Executive Order stating that "the privileges granted temporarily to the Chippewa [describing and quoting] are hereby revoked." A later 1855 Chippewa Treaty ceded additional lands, established separate reservations, and provided the "Indians . . . entirely relinquish and convey . . . all right, title, and interest, of whatsoever nature . . . in, and to any other lands in the territory of Minnesota. . . . " The Eighth Circuit held the 1850 Presidential Order was invalid and that the later 1855 Treaty relinquishment did not extinguish these temporary hunting and fishing rights. The questions presented are:

1. Whether the Eighth Circuit correctly held – in conflict with decisions of this Court – that a Presidential Order may be reviewed and held invalid.

2. Whether the Eighth Circuit correctly held that the 1855 Treaty relinquishment of right, title and interest did not extinguish hunting and fishing rights in the territory.

3. Whether a federal court may decline to apply this Court's "moderate living" doctrine, *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, (hereinafter *Fishing Vessel*), 443 U.S. 658 (1979), and order a maximum of one-half the hunting and fishing be dedicated to Indian Bands' harvest even though the Band has become wealthy as a consequence of casino gambling.

PARTIES TO THE PROCEEDING BELOW

Petitioners, Counties of Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison and Pine, are counties in an area of mid-Minnesota ceded to the United States under Treaty with the Chippewa of 1837 (7 Stat. 536). They were formed shortly after Minnesota statehood in 1858.

The State of Minnesota and officials charged with conservation management and enforcement were the original defendants (collectively "Minnesota"). The "Minnesota Counties" intervened in the district court proceeding.[1]

Respondents and original plaintiff/appellees below are the Mille Lacs Tribe and some members and officers. We refer to them collectively as "Mille Lacs." They were later joined by the United States. The Fond du Lac Band of Minnesota separate case was consolidated.

Later intervenors (after decision in "Phase I") were the six Bands from Wisconsin: St. Croix Chippewa Band, Lac Du Flambeau Band, Bad River Band, Sokaogon Chippewa Community, Red Cliff Band and Lac Courte Oreilles Band. These latter Bands are referred to below as the "Wisconsin Bands."

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[1] After one Panel of the Court of Appeals reversed a district court order to the contrary.

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PETITION FOR A WRIT OF CERTIORARI

The Counties of Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison and Pine (hereinafter "Minnesota Counties") respectfully petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Eighth Circuit in these cases.

OPINIONS AND ORDER BELOW

The opinion of the court of appeals is reported at *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997) and is reproduced in the Appendix[1] ("App."). That opinion affirmed prior decisions of different district court judges in two "phases." The Phase I opinions of the United States District Court for the District of Minnesota are reported at *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118 (D. Minn. 1994) (Judge Diane Murphy) (deciding summary judgment motions), App. 351; *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994) (decision holding Mille Lacs Band's 1837 treaty rights continue), App. 212; *Fond du Lac v. Carlson*, (holding *Mille Lacs* determines same issue for this Band), unreported Mem. Op. and Order of March 18, 1996 (App. 419).

Phase II decisions are *Mille Lacs Band v. Minnesota*, March 29, 1996 Mem. Op. and Order (Judge Michael J.

[1] There are separate petitions; the State of Minnesota filed the Appendix for all petitioners.

Davis), unreported (extending 1837 treaty rights to Wisconsin Bands), App. 164; *Mille Lacs Band of Chippewa Indians v. Minnesota*, summary judgment to all Bands, 952 F. Supp. 1362 (D. Minn. 1997), App. 74.

JURISDICTION

The decision of the Court of Appeals was entered on August 26, 1997 (App. 1). A timely Petition for a rehearing en banc was denied on November 17, 1997 (App. 482) (with Circuit Judges Loken and Wollman voting to grant). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1983).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This case involves these constitutional provisions: U.S. Const. art. II § 2:

> **Powers of the president**. The president shall be commander in chief of the army and navy of the United States, ...
>
> He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; . . . .

The case also involves the following statutes, treaties and Executive Order, which are reprinted verbatim in the Appendix.

Treaty with the Chippewa of 1837 (7 Stat. 536), App. 484, which by cession extinguished the Indian title to this

area. Article 5 temporarily granted a "privilege of hunting, fishing and gathering wild rice . . . during the pleasure of the President." App. 486.

Executive Order of February 6, 1850. President Zachary Taylor issued this Executive Order, a provision of which expressly revoked the 1837 privilege:

> [T]he privileges granted temporarily to the Chippewa Indians . . . by the fifth article of the treaty made with them on the 19th day of July, 1837, "of hunting, fishing and gathering the wild rice, . . . " are hereby revoked.

App. 565.

Treaty with the Chippewa of 1855 (10 Stat. 1165) (App. 502) This Treaty ceded land in other areas and provided separate reservations for the Chippewas. Article I of that treaty provided the following relinquishment:

> And the same Indians do further fully and entirely relinquish and convey to the United States any and all right, title or interest, of whatsoever nature the same may be which they may now have in, and to, any other lands in the Territory of Minnesota or elsewhere.

Id., App. 502.

STATEMENT OF THE CASE

Historical Facts.

The Counties are located in a 13-million acre area of mid-Minnesota ceded to the United States under Treaty with the Chippewa of 1837 (7 Stat. 536)[2]. The treaty also

[2] There were also other ceded lands, now in Wisconsin.

temporarily granted the Bands a "privilege of hunting, fishing and gathering wild rice . . . during the pleasure of the President."

Settlement in the area accelerated, and the continued activities of the Indians led to conflicts with incoming settlers. The district court acknowledged evidence establishing one common problem, Indian killing of settlers' livestock. Settler claims for depredations by the Chippewa – including killing livestock – were exhibits. D 17-21. The Report of the Commissioner of Indian Affairs of August 29, 1846 noted such depredations and that difficulties between Indians and Whites were frequent. Shootings and killings both between groups of Indians and with settlers were also documented (*e.g.*, L.A. 9306-8).[3]

The President received a recommendation that the 1837 privilege be revoked in the 1849 Report of Commissioner of Indian Affairs (S.A.A. 347). A formal Petition from the Minnesota Territorial Legislature to the President and Congress also specifically asked that the "privileges given to them by Article Five of the Treaty . . . be revoked." App. 566.

President Taylor responded to the problems and recommendations on February 6, 1850, by issuing a Presidential Order expressly revoking:

> [T]he privileges granted temporarily to the Chippewa Indians . . . by the fifth article of the treaty made with them on the 19th day of July,

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[3] The record filed in the Circuit Court is designated as L.A. for Landowners' Appendix and S.A.A. for State's Appendix.

> 1837, "of hunting, fishing and gathering the wild rice, . . . *are hereby revoked.*

App. 565, emphasis added.

In 1855, another cession Treaty (10 Stat. 1165) was negotiated which provided separate reservations for the Chippewa Bands. Article I of that treaty provided:

> And the same Indians do further fully and *entirely relinquish* and convey to the United States any and *all right, title or interest*, of whatsoever nature the same may be which they may now have in, and to, *any other lands* in the Territory of Minnesota or elsewhere.

App. 502, emphasis added.

The State of Minnesota was created in 1858. Among the first laws adopted by the new State were conservation laws (App. 569 and 573). They have generally been applied to all citizens, including members of these Bands, when off reservation.

United States officials have confirmed this authority of the State and the construction of the events summarized that the privileges were *revoked*. For notable example, President Franklin Roosevelt[4] responded in 1938 to a specific Chippewa claim that special off-reservation fishing and hunting rights had been preserved by treaty:

> [T]he hunting, fishing, and gathering privileges guaranteed by the 1837 and 1842 Treaties had been *revoked* by the 1850 executive order. . . .

---

[4] President Roosevelt's administration was notably sympathetic to Indians. These Bands are organized under legislation sponsored by this administration.

> the Indians . . . now have no greater right to hunt or fish on the ceded area . . . than do other citizens of the State. . . . (and) are amenable to the State game laws. . . .

Letter from President Franklin Roosevelt to Bad River Band (March 1, 1938), App. 575, emphasis added.

Procedural Background.

The case was commenced in 1990 by the filing of a complaint by the Mille Lacs Band against the State and its conservation officials. This was nearly a century and a half after President Taylor's 1850 Order of revocation. The Mille Lacs sought a declaration that treaty hunting and fishing "rights" continued and injunctive relief to enforce.

These Minnesota counties in the area affected applied to intervene, citing particularly impacts on public land values and county law enforcement. That intervention was denied by the district court. (Order of Judge Diane E. Murphy, 140 F.R.D. 390). On appeal to the Court of Appeals, the intervention was ordered (*Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993)). The United States was allowed to intervene in support of that Band in 1994. The case was bifurcated, with Phase II to consider "resource allocation issues . . . and the validity of particular measures to regulate. . . ." *Mille Lacs*, 861 F. Supp. 790, App. 212 at 217-218.

After trial in "Phase I," a decision was filed by the district court on August 24, 1994, Judge Diane Murphy presiding. *Id.* The district court held that the President's 1850 Order revoking the privilege was unlawful or ineffective and that the 1855 Treaty relinquishment did not

extinguish the hunting and fishing privileges. The case was set for a "Phase II" proceeding to allocate the resource and determine what state conservation laws could be applied to Bands.

Negotiations commenced (as directed) between the State and Bands for Management Plans and Protocols, whereby total harvests of fish and game would be jointly determined, the Bands would regulate their own harvests up to fifty percent, and the State would restrict others to accommodate the Bands' take.

As the Phase II trial approached, six Wisconsin Bands of Chippewa, descendant from other Bands signatory to the 1837 Treaty, were allowed to intervene, asserting claims in this area of Minnesota. Plaintiff Fond du Lac Band had commenced a separate action against state officials in 1992 with claims both in this area and in northern Minnesota (under a separate treaty). After the Mille Lacs Band was successful, the Fond Du Lac Band's 1837 treaty claim was consolidated with the *Mille Lacs* case. (The Counties were denied intervention in the Fond du Lac case.) All the Bands entered into the State-Band Management Plan/Protocol negotiations.

In Phase II, another district court judge (Michael J. Davis) ruled on Summary Judgment.[5] This Memorandum Opinion and Order, 952 F. Supp. 1362 (D. Minn. 1997), App. 74, approved the State-Band Management Plan/Protocols and granted judgment to all Bands.

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[5] The judge in Phase I, Diane Murphy, having become judge on the Eighth Circuit Court of Appeals.

The court held all Bands continued to enjoy rights under the 1837 Treaty which include fishing and hunting under their own regulation, not state law. The Management Plans require concomitant reduction of other citizens' hunting and fishing by the State. An injunction was entered solely against the State defendants ordering implementation of the Plan/Protocols and prohibiting enforcement of state law against Band members. 952 F. Supp. at 1398, App. 162-163. The Band harvests include commercial net fisheries on game fish and such hunting activities as night and light hunting deer over bait, both long illegal under state conservation laws. The Band harvests range from 50% of some game species and areas to a "phase-in" from a first year approximately 15% of fish in Mille Lacs Lake, increasing each year.

The court specifically declined to apply this Court's "moderate living" doctrine analysis (*Fishing Vessel Assn.*, 443 U.S. at 686) to reduce or allocate harvest of the Bands, all of which own and operate at least one casino. (Mille Lacs and Fond du Lac have two each.) The record included reports using figures from tribal audits showing each Band's casino(s) provided sufficient revenue to raise average income above the "moderate income" defined in federal statute. The district court held that before applying the "moderate living" doctrine to allocate, "the Bands must be given the opportunity to choose whether or not to continue with a way of life that is based on hunting, fishing and gathering." 952 F. Supp. at 1394, App. 150-151. The court also held that generally there was no treaty right of access to private lands. Band harvests are taken from public lands and waters and those private lands opened by statute. Since the resource share (up to

one-half), is calculated from total harvestable, this has the effect of concentrating harvest on public lands.

The district court has retained continuing jurisdiction over implementation of the case.

The appeals followed. The matter was briefed on an accelerated schedule. On August 26, 1997, the Circuit Panel (Judge McMillian, Senior Judges Lay and John Gibson) rendered an opinion affirming in all respects the district court, App. 1. The Circuit applied the "clearly erroneous" standard, holding the President's Order of revocation invalid and the 1855 relinquishment ineffective to extinguish hunting and fishing privileges. Though acknowledging the order approved "in effect an allocation of resources between treaty and nontreaty harvesters," the court concluded it "would have no occasion to consider the moderate living doctrine." Petitions for Rehearing En Banc were denied on November 17, 1997 by Order with two judges (Judges Wollman and Loken) voting to grant, App. 482.

REASONS FOR GRANTING THE WRIT

The President of the United States has constitutional Article II powers as well as Congressional-delegated power to issue Executive Orders which this Court has consistently held are not subject to court review. President Taylor's Executive Order of 1850 expressly *revoking* the temporary "privilege during the pleasure of the President" is such an Order. The Order is within *two* of the President's constitutional powers under U.S. Const. art. II

to make treaties with Senate consent *and* to act as commander in chief to implement them (since Indian affairs were then army matters).

This Court has repeatedly and recently held such actions of the President are unreviewable by courts. The Circuit Court decision failed to cite or discuss the recent Supreme Court decisions.

This Court has also held that language in a later treaty relinquishing "all right, title and interest" *extinguishes* all Indian claims, including hunting and fishing rights. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). The Panel failed to apply this precedent (which reversed a decision of the Ninth Circuit which had held that hunting and fishing rights survived such language of relinquishment).

The resultant problematic management of Minnesota's hunting and fishing resources is of exceptional public importance and raises serious constitutional issues. State conservation law may not be enforced with respect to Band members off reservation.[6] By court order, these state laws must be adjusted and enforced to curtail harvests by all other citizens to accommodate up to a "presumptive fifty percent harvest" for Bands already wealthy as a result of casino gambling. Reports of State and County experts so concluding using audit figures produced by the Bands are reprinted in Counties Appendix in the Circuit Court, pp. 001-122. If revenues from the casinos operated by each Band are considered, each has already exceeded the "livelihood, that is to say, moderate

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[6] On public and some private lands.

living" this Court held to be the treaty entitlement. *Fishing Vessel,* 443 U.S. at 686.

I. The Eighth Circuit Decision Conflicts In Principle With This Court's Precedents That Such an Order of the President Is Not Subject to Court Challenge.

The nonjusticability of "political" decisions by the President, based on constitutional separation of powers doctrine, had been confirmed by this Court the year before President Taylor's 1850 Order in *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849). This Court again confirmed that courts did not have jurisdiction to review such actions of the President a decade after this case should have been brought. *Mississippi v. Johnson,* 4 Wall. 475 (1867). Accordingly, at the time of the action – and for another hundred and forty years – the action of the President was unchallenged.

In 1962, the seminal case of *Baker v. Carr,* 369 U.S. 186, 217 (1962), established a three-part inquiry to determine justiciability. The President's authority to execute the Order of 1850 surely meets each test element – especially with a challenge proposed 140 years later.

First, Indian treaties, and their implementation, were constitutionally committed to the President both by the treaty power *and* as commander in chief (Art. II, § 2). Second, the particular political expertise to balance the interests of the Indians and of the rest of the Nation including settlers is Presidential (and impossible to recreate over a century later). One hundred forty years history of actions of the State and all its citizens in reliance counsel against judicial intervention now to

remake that history. What this Court has said of acts of Congress may be said of the President:

> Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently . . . we cannot remake history." 420 U.S., at 449.

South Dakota v. Yankton Sioux, 66 U.S.L.W. 4092, 4100 (January 26, 1998), quoting and citing *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 449 (1975).

In the only comparable attempt to bring a judicial challenge against a President who terminated treaty provisions (with a foreign nation), this Court held federal courts do not have jurisdiction to review such actions of the President of the United States. (*Goldwater v. Carter*, 444 U.S. 996 (1979), granting certiorari and directing lower court to dismiss complaint.)

In that case, the Court of Appeals for District of Columbia had first reviewed, and then upheld, the President's action to terminate treaty provisions. The court analysis in the *Goldwater* case is directly applicable to this case:

> Finally, and of central significance, the treaty here at issue contains a termination clause. . . .
>
> . . . the President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of notice of termination.

Carter v. Goldwater, 617 F.2d 697 at 708 (D.C. Cir. 1979).

Here, the Senate consented to a treaty granting a temporary[7] privilege which expressly provided that it continued only *"during the pleasure of the President."* The President's action was its revocation.

In *Goldwater*, this Court granted certiorari and ordered the case dismissed. Four Justices joined a statement that the case was not even justiciable:

> Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed.

Goldwater v. Carter, 444 U.S. 996, 1006 (1979). This case, of course, deals with a domestic Indian treaty, but the conclusion should be the same: political questions resolved a century and half before are non-justiciable.

A more recent decision of this Court, *Dalton v. Specter*, 511 U.S. 462 (1994), is also closely analogous. The language of the Base Closure Act recognized nearly absolute Presidential discretion by providing that the President was to receive a report of the Commission and decide "whether to approve or disapprove." Here, the 1837 Treaty privilege continued only "during the pleasure of the President," and after receiving the Commissioner of Indian Affairs Report proposing revocation, the President decided to issue the 1850 Order which unequivocally revoked that privilege. The language used has the same meaning – if articulated in 19th Century terms. That

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[7] "Temporary" is President Taylor's characterization.

the President alone would decide what was understood – and agreed to in the treaty – by both the Indians and the Senate in the Treaty.

This Court in *Dalton* further noted "the 1990 Act does not at all limit the President's discretion in approving or disapproving. . . . " *Dalton*, 511 U.S. at 476. This characterization equally applies to the 1837 Treaty language "during the pleasure of the President," which "does not at all limit the President's discretion. . . . " *Id.*

The separation of powers argument is also based in respect for the constitutional role of the President. Here, the President's authority was itself founded in *two* constitutional powers: The Art. II, § 2 power to make treaties *and* his separate Art. II § 2 role as commander in chief (since Indian affairs during this period were administered through the Army). Explicit statutory recognition of the President's authority was both in the Treaty itself *and* in the general delegation to the President of authority over Indian affairs at the time. Act of June 30, 1834, 4 Stat. 735 (1834) (later codified as 25 U.S.C. § 9 (1983)). .

In conflict with the principle stated in *Dalton*, the Circuit Court upheld the district court's blithe blanket determination that court review of a Presidential Order was appropriate:

> [J]udicial review of the validity of a presidential order is appropriate where necessary to resolve a case within the court's jurisdiction.

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 828 (D. Minn. 1994) (rejecting Counties' arguments).

The Circuit upheld this analysis in a *footnote* (fn. 20) without discussion of either *Goldwater* or *Dalton* though both had been cited and argued by the Counties.

In *Dalton*, this Court stated the conflicting principle and rebuffed such assertion of judicial authority to review and reverse acts of the President:

> But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.
>
> . . .
>
> How the President chooses to exercise the discretion Congress has granted him is not a matter for our review. . . .
>
> . . .
>
> . . . The claim that the President exceeded his authority under the 1990 Act is not a constitutional claim, but a statutory one. Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.

Dalton, 511 U.S. at 474, 476-77.

II. The Circuit Decision Conflicts With This Court's Decision that a Treaty Relinquishing "All Interests . . . In or To Lands" Extinguishes Hunting and Fishing Rights.

The later treaty of 1855, which gave the Mille Lacs their reservation, also provided a final express extinguishment of any claim of remaining rights off reservation. The Circuit holding to the contrary conflicts with the

decision in *Oregon v. Klamath*, 473 U.S. 753. It also conflicts with a decision of the same Circuit in *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 905 (1980)), which the Panel, in a glaring omission, did not even cite or attempt to distinguish.[8]

In the *Klamath* cases, the language was virtually identical to that used in the 1855 Chippewa Treaty. The Ninth Circuit had held that Klamath hunting and fishing rights continued to exist since not expressly mentioned and terminated. *Klamath Indian Tribe v. Oregon Dept. of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984). The Eighth Circuit Court had reached the opposite conclusion after considering the nearly identical language in *Red Lake*, 614 F.2d 1161. In *Red Lake*, District Court Chief Judge Devitt had based his decision on cession analysis of this Court:

> Two recent U.S. Supreme Court cases have construed Indian cession agreements and enactments with language nearly identical to that quoted above (citing). These cases make clear that "all right, title, and interest" language is "precisely suited" for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands.

United States v. Minnesota, 466 F. Supp. 1382, 1385 (D. Minn. 1979). (*See, also, Yankton Sioux, supra*, at 4096.)

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[8] This omission is especially mystifying where the district court in *Red Lake* expressly cited the Mille Lacs Band as one which "would not retain special hunting and fishing rights but instead would be subject to state gaming laws the same as non-Indians." *United States v. Minnesota* (later *Red Lake*), at 1387.

This Court granted certiorari in the Ninth Circuit's *Klamath* case (citing *Red Lake* as the conflict). The stated issue by this Court in *Klamath* was "whether a special right [to hunt and fish], nonexclusive but free of state regulation, was intended to survive in the face of the language . . . ceding 'all . . . right . . . in and to' the ceded lands." 473 U.S. at 765. This Court held that a cession of all interests as a matter of law extinguishes treaty hunting and fishing rights tied to the land, even if there is no express mention of those rights. *Klamath*, n. 23, p. 773.

This Court's holding in *Klamath* also restates the controlling principle that "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal', clearly runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774. (*Yankton Sioux*, 66 U.S.L.W. at 4096.)

The Circuit Court has disregarded that principle and reached a conflicting decision, by characterizing the *Klamath* rights as referring to "*exclusive* and *on-reservation* rights" as contrasted with these "*non-exclusive* and *off-reservation* rights." 124 F.3d at 921, App. 39, emphasis in opinion. This is ironic, indeed. On-reservation rights are always held to be the more sacrosanct, involving the homes of the tribes, their sanctuaries under the press of encroaching civilization or settlement.

III. The Circuit Holding Conflicts with the Interpretation of the President and of the Federal Agency Charged with Implementation of Indian Policy

This Court has recently reiterated the need to "take note of the contemporary historical context and subsequent congressional and administrative references. . . ." *Yankton Sioux, supra,* at 4098.

The most important such evidence, of course, is the very language of the President's 1850 Order. President Taylor referred to the privilege as "temporary" and expressly revoked it. This Order, along with the recommendation of the Commissioner of Indian Affairs and of the Territorial Governor which preceded revocation, are probative of the official understanding at the time. As the "contemporaneous view of the Executive Officer responsible for administering the statute," President Taylor's interpretation is "entitled to very great respect." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 254 (1985). *Accord Watt v. Alaska,* 451 U.S. 259, 272-273 (1981). (*See, also, Yankton Sioux, supra,* at 4099, quoting *Rosebud Sioux v. Kniep,* 430 U.S. 584 (1977) at 602, relying on a Presidential Proclamation as "an unambiguous, contemporaneous statement by the Nation's Chief Executive, of a perceived disestablishment.")

The historical understanding that no special privilege remained after the Order of 1850 may also be proven by considering official representations made by the Executive officers, especially the Commissioner of Indian Affairs, to the Indians and others over the intervening century.

In 1889, Congress adopted the Nelson Act, 25 Stat. 642 (1889) and directed settlement of Chippewa claims, even involving the reservations. In the course of the negotiations, the question was specifically asked by the Mille Lacs chief as to that Band's hunting privileges:

> Another thing – about the wild animals. If an Indian wishes to go outside the reservation to hunt deer, will he be allowed to do so in the hunting seasons?" Rice replied that:
>
> in regard to hunting for deer, that is a matter for the Legislature of the State to determine. You can hunt deer in any event, whenever you find them during the season set apart for hunting; and wherever the white man may hunt your young men will have the same right to do so.

Mille Lacs, 861 F. Supp. at 820., App. 297.

As the historical events faded in memories, periodically inquiries were made about the treaties – and Orders – most usually to the Commissioner of Indian Affairs (COIA). These were meticulously researched from the archives and summarized by expert historian. (L.A., Vol. 25.) They were consistent in reflecting the understanding that the President had properly revoked the privilege. Examples of the most important of these included those from the Commissioner of Indian Affairs, since this was the administrative agency with direct authority over the subject area.

In 1891, the Commissioner of Indian Affairs responded to Chippewa inquiry concluding state laws "apply with like force to the Indians."

In 1926, another COIA responding to a Chippewa inquiry stated that no special rights remained under the 1837 Treaty and concluded it was necessary to comply with state law on ceded lands "in view of the modified provisions of the treaty." (Quoted and cited 861 F. Supp. 784, 821 (D. Minn. 1994). App. 299-300.)

In 1929, the Assistant Commissioner responded there was "no treaty . . . whereof . . . the Chippewas . . . of . . . Minnesota have the right to hunt or fish on land ceded . . . without observing state game laws." Newell at L.A., Vol. 25, pp. 7944, 7963.

The same year, the COIA also concluded Indians were subject to state game laws. (*Id.* at Vol. 25, p. 8001.)

In 1934, the COIA informed a Mille Lacs that his arrest for hunting out-of-season off-reservation was valid:

> [T]he state game laws would apply and you would be punishable under the state game laws for killing deer on the land out of season.

Letter from Commissioner of Indian Affairs to tribal member (April 30, 1934), also cited at 861 F. Supp. at 821, App. 300.

In 1938, the Interior Solicitor in a letter to the Attorney General articulated the same conclusion (after quoting the Order of 1850):

> It follows, therefore, that as to the area ceded by the treaties of July 29, 1837, and October 4, 1842, the Indians have no greater right to hunt or fish therein than do the other citizens of the state; that is, the Indians are amenable to the

> game laws of the state while hunting or fishing within the areas ceded by those treaties.

Letter from Assistant Solicitor of Interior Oscar L. Chapman to Attorney General (January 26, 1938), L.A., Vol. 25, p. 8005.

A letter from the Assistant COIA to a member of Congress also quoted the 1850 Order and concluded:

> As a result of this Executive Order the members of the Lake Superior band of Chippewa Indians have only the right to engage in those activities on the ceded lands in common with other citizens of the State of Wisconsin and in accordance with the laws of that State.

Letter from Assistant Commissioner to House of Representatives (August 23, 1945). S.A.A. 314.

Coming from the federal agency charged with overseeing all Indian affairs, 25 U.S.C. § 2 (1983) – these interpretations are entitled to "considerable deference." *Andrus v. Idaho*, 445 U.S. at 729. *Accord National R.R. Passenger Corp. v. Boston & Main Corp.*, 503 U.S. 407, 417 (1992).

The Circuit not only declined to accord the Interior Department's interpretation any deference, but it completely ignored it, even though it was argued by the Counties below.

It is extremely significant that a later President of the United States, Franklin Roosevelt, reached the same conclusion, surely acting with advice and research of responsible officials. President Roosevelt specifically noted the privilege had been revoked by the 1850 Order.

> The Indians enjoyed these special hunting and fishing privileges until President Taylor issued the following order under date of February 6, 1850:
>
> [quoting order]
>
> . . . the special hunting and fishing privileges temporarily reserved to the Chippewa Indians . . . were revoked by order of the President, the Indians . . . now have no greater right to hunt or fish on the ceded area . . . than do other citizens of the State.

Letter of March 1, 1938, from President Franklin Roosevelt to Bad River Band. App. 575.

The direct conflict between the Circuit and these Executive interpretations provides an alternative, independently compelling reason to grant the writ. *See Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974) ("We granted certiorari because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary [of DOI]"); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (certiorari granted because lower court decisions "upset twenty-five years of important War Department rulings and practices"). *See, also, Williams v. Lee*, 358 U.S. 217, 218 (1959) (certiorari granted because lower court decision "was a doubtful determination of the important question of state power over Indian affairs").

IV. This Circuit Panel Applied the Wrong Standard of Review In Conflict with Decisions of this Court, Other Circuits, and Other Panels of the Eighth Circuit.

The standard of review relied on by the Circuit both when invalidating the President's 1850 Order revoking the privilege *and* when disregarding the effect of the 1855 Treaty was the same – and the wrong – standard:

> [W]e cannot conclude that the finding that the Bands did not consent to removal is *clearly erroneous*. . . .
>
> . . .
>
> The district court's factual findings regarding the intention of the parties to the 1855 Treaty are well supported, and we cannot conclude they are *clearly erroneous*.

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 917 and 921 (8th Cir. 1997), emphasis added.[9]

This conflicts with the (correct) standard applied in other circuits. In 1990, the Tenth Circuit described at length the correct standard and explained the reasons for applying the *de novo* standard of review:

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[9] The district court, Judge Murphy, based her rulings on factual findings of Chippewa intent or understanding, e.g.:

> "The court *finds* that the Chippewa did not intend to give up their 1837 treaty privilege and they did not understand the 1855 treaty to have that effect."

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 799 (D. Minn. 1994) (Emphasis added.)

> The Supreme Court has issued a number of pronouncements to guide lower court interpretations of statutes and EOs [Executive Orders] affecting the status of Indian reservations. . . . In the above cases the Supreme Court has applied without comment a *de novo* standard of review in determining congressional intent . . . . The ascertainment of congressional intent is a matter of statutory construction, which typically involves a *de novo* review. To the extent that statutory construction turns on a historical record, however, it involves a mixed question of law and fact. Where a mixed question "primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986). Such is the case here, where key district court legal conclusions, e.g., the need for explicit language mentioning boundary reduction or evidence of cession and compensation, "rest on an erroneous view of the law." *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789, 72 L. Ed. 2d 66 (1982).

Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1383-1394 (10th Cir. 1990), *cert. denied* 498 U.S. 1012 (1990). (Footnote omitted.)

In a prior decision, the Eighth Circuit (a different panel) cited the Ninth Circuit and noted that the appropriate standard of review is *de novo* not the "clearly erroneous" standard adopted by this Panel.

> Mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewable de novo. *United States v. McConney*, 728 F.2d 1195,

> 1199-1204 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824, 105 S. Ct. 101, 83 L. Ed. 2d 46 (1984). Because our decision is predominantly one of determining whether the established facts fall within the relevant legal definition, albeit a constitutional definition, we apply a de novo standard of review. *Id.* at 1201-03.

Falls v. Nesbitt, 966 F.2d 375, 377 (8th Cir. 1992).

The Ninth Circuit has repeatedly held that the meaning of treaty language or Executive Orders are "ultimately a question of law reviewed *de novo*." *United States v. Washington*, 969 F.2d 752, 756 (9th Cir. 1992) (as restated as recently as last month in *United States v. Washington*, No. 96-35014, slip op. at 807 (9th Cir. Jan. 28, 1998)).

The importance of the standard applied cannot be overstated. *Klamath* would have been *differently* decided since the district court made the same kind of findings as here. This Court's recent review in *Yankton Sioux, supra*, reflects the same *de novo* review standard.

V. The Panel's Opinion Presents Issues of "Grave Constitutional Dimension" and "Exceptional Public Importance."

The Circuit decision affirmed the resurrection of a treaty privilege long revoked or extinguished. To implement this, it has approved a complicated scheme for management and conservation of Minnesota's natural resources under the continuing jurisdiction of the federal district court to supervise overlapping State and Band regulations. (The latter from eight Bands from two States.) The system approved raises serious issues.

The court's decision carves out an area of 13+ million acres of Minnesota in which state conservation law is displaced as to eight separate Bands. On *public* lands and waters, other citizens must sit by and watch Band hunting and fishing take up to 50% of the harvest during closed seasons (and using unlawful methods), with state license and taxes paying the costs to manage and conserve the resource.

Geographic magnitude alone is a compelling reason to grant the writ. In *Andrus v. Utah*, 446 U.S. 500, 506 (1980), for example, this Court explained that it granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands." The area involved in that case comprised some 571,000 acres, *id.* at 506, n. 6; a fraction of the millions of acres of land and waters involved in this case. *See, also, Andrus v. Idaho*, 445 U.S. 715, 722 (1980) (certiorari granted to resolve status of "some 2.4 million acres of desert land within Idaho"); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983) (certiorari granted "[i]n view of the importance of the case in the administration of . . . more than 33 million acres of land").

In addition to the geographic scope of this case, its jurisdictional significance makes it especially important. Federal, state and tribal authority over the lands and waters is dramatically changed. Within this area, eight bands, including six from hundreds of miles away (and from another state) authorize member hunting and fishing, taking up to half the natural resources and displacing state police power. The State and Counties are precluded

from exercising fundamental aspects of sovereignty and governmental power.

This poses significant regulatory problems. Fish and game are vital environmental and economic state resources, as well as part of the way of life of those who choose to live in these Counties. Minnesota sought statehood in significant part to be able to regulate these resources themselves and immediately enacted a comprehensive regulatory scheme of conservation. *See*, e.g., Chapters XIX and XLV, App. 569 and 573.

Here, the Bands and the court specifically approved commercial gillnet fisheries including many on small lakes, shining deer over bait and other similar practices up to a 50% harvest in each area (or lake). 952 F. Supp. at 1379, 1381, 1382, App. 112-125. All are violations of State Conservation laws.

> We have not previously found such absolute freedom from state regulation on nonreservation lands, even in the face of Indian cession agreements that expressly reserved a right to hunt or fish . . . .

Klamath, 473 U.S. 753 at 764 n.16. (numerous citations omitted)

A prime example of impacts are the opening of a commercial gillnet fishery on Mille Lacs Lake. This lake was formerly the premier sports fishery in Minnesota, providing not just an important element of the way of life of the Counties' residents but also substantial economic benefit to all citizens through tourism attracted to the Lake (including the Band which operates a casino on its shores).

The State's authority to regulate hunting and fishing in these vast areas of the State has been restricted and precluded altogether as to Indian Bands from *two* states when hunting and fishing under the Band codes. The State is forced to cut back its citizens' rights to hunt and fish to accommodate these priority claims. The State's regulatory and enforcement system is arguably thereby converted to enforcement of federal priorities in violation of the Tenth Amendment as construed by this Court in *Printz v. United States*, 117 S. Ct. 2365 (1997).

The Panel answer to this constitutional problem is that the State "voluntarily negotiated" the Plan/Protocols. 124 F.3d at 928-929, fn. 44, App. 58. However, this "negotiation" of the State's policy power was only done at the order of the court below. Such federal court jurisdiction to order a state to negotiate its sovereign interest was held violative of the XI Amendment by this Court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in context of a statute enacted by Congress which specifically *required* such negotiation. Here, there is no such statutory authority.

The resultant scheme also "allocates" the resource between citizens by requiring the State to set aside numbers of fish and game up to the number the Bands claim each year as their entitlement. Reductions in fishing seasons and game harvest for other citizens are ultimately required to be enforced by State regulations and officers.

The record established that for these Bands the total Band livelihood (average) already far exceeds the "moderate living" which this Court held was the (maximum)

treaty entitlement even where a permanent treaty right was involved. *Fishing Vessel*, 443 U.S. 659 (1979). As noted above, each Band operates at least one gambling casino – providing employment for any member desiring it, and millions of annual profits.

Finally, the decision forces conservation back into the Nineteenth Century by approving such practices as commercial net fisheries on game fish and night and light hunting and baiting practices rejected by Minnesota for years. Such conservation policy enacted by the State of Minnesota to protect its resources (and by most enlightened states and countries) are among the police powers of that state protected by the Constitution. The natural resources, and their shared use, enjoyment and conservation by all citizens, will suffer. That is a matter of exceptional public importance.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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Supreme Court, U.S.
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Nos. 97-1356 and 97-1357

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF AITKIN, *et al.*,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

Respondents.

JOHN W. THOMPSON, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE CITIZENS EQUAL RIGHTS ALLIANCE (CERA) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

WHETHER THE NELSON ACT WAS INTENDED BY CONGRESS AS A DISPOSAL ACT TO EXTINGUISH ALL RIGHT, TITLE, CLAIM AND INTEREST TO LANDS AND THE USUFRUCTURY RIGHTS OF THE TREATY OF 1855 UPON THE LANDS INCLUDING THE RIGHTS TO HUNT, GATHER WILD RICE AND FISH OF THE MILLE LACS BAND OF CHIPPEWA?

WHETHER THE UNITED STATES CONSTITUTION GRANTS TO THE JUDICIAL BRANCH THE AUTHORITY TO COMPEL THE STATE OF MINNESOTA TO REGULATE HUNTING, GATHERING OF WILD RICE AND FISHING ON STATE AND PRIVATE LAND FOR THE PRIMARY BENEFIT OF THE MILLE LACS BAND OF CHIPPEWA BY REINSTATING AN INDIAN TREATY?

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INTEREST OF THE AMICUS CURIAE[1]

The Citizen's Equal Rights Alliance (CERA), is a non-profit association of non-Indians and Indians incorporated and licensed under the laws of the State of New Mexico and headquartered in Santa Fe, New Mexico. CERA's interest in this lawsuit arises from CERA's advocacy of the principle that all people should be treated equally, whether Indian or non-Indian. In this, CERA's interest mirrors that of Petitioners. The Chippewa Bands' position that they are entitled to the reinstatement of treaty rights to avoid application of state police power authority to regulate hunting, fishing and gathering rights applicable to all other state citizens, violates the principle of equal rights under law. This amicus brief supports the Petitions for Certiorari for the Counties, Docket No. 97-1356 and the Landowners, Docket No. 97-1357.

SUMMARY OF THE ARGUMENT

The main argument of this brief challenges the authority of the Courts of the United States to reinstate treaty rights deemed extinguished or terminated for eighty years by all parties. Upon the land cession of the Mille Lacs Band and their consent to be placed on a reservation by the treaty of 1855, Congress placed the

---

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

termination of the treaty rights on non-reservation land to hunt, fish and gather wild rice at the pleasure of the President. President Zachary Taylor terminated the usufructuary treaty rights by Executive Order on February 6, 1850. this termination and further act of full extinguishment of the Mille Lacs reservation by the Nelson Act of 1889, ch. 24, 25 Stat. 642, §§ 3, 5 and 6, was treated by the United States as an extinguishment not only of the reservation but also of the treaty rights until 1970. In 1970, the United States with a change of Indian policy to restore tribal sovereignty, brought suit on behalf of the Leech Lake Band of Chippewa to restore the usufructuary treaty rights from the Treaty of 1837. *Leech Lake Band of Chippewa v. Herbst*, 334 F. Supp. 1001 (D.Minn. 1971). The 1837 Treaty established all of the claimed treaty privileges for all of the Chippewa Bands, including Mille Lacs. Although there were multiple land cession treaties with the various Chippewa Bands, the restoration argument of the Bands and the United States has not varied in the many cases brought by the United States has not varied in the many cases brought by the United States on behalf of the different Bands. This case, therefore, shares many facts and potential consequences with the *Leech Lake Band of Chippewa v. Cass County* case, Docket No. 97-174, already briefed and argued before this Court.

By unanimous opinion of the court in *State of Alaska v. Native Village of Venetie*, 1998 WL 75038 (U.S.), 118 S.Ct. ___ (1998), this Court ruled that Congress' intent to extinguish or terminate an Indian reservation is the paramount consideration in examining whether a reservation was actually terminated. This reasoning comports to the plain language of the Property Clause, Art. IV, Sec. 3, Cl. 2, that "Congress shall dispose of the territories . . . " This

very simple reasoning makes Congress accountable for the use of the territorial war powers. There is no question that Congress intended with the Nelson Act of 1889 to terminate all of the Chippewa reservations except Red Lake and White Earth. Congress has never acted in any way to restore the Mille Lacs reservation. There is a real question whether the constitutional power exists in Congress to restore only the usufructuary treaty rights to any Indian Tribe over lands no longer in its jurisdiction under the Property Clause. Instead of leaving this question to Congress, the Federal Courts in the Eighth Circuit decided they would restore the treaty rights of the 1837 Treaty to the Mille Lacs Band at the urging of the Executive Branch. This amicus brief challenges whether the federal courts have jurisdiction under Art. III to even hear a suit brought by the Executive Branch asserting Property Clause authority.

STATEMENT OF CASE

Beginning in 1971 with the Leech Lake Band of Chippewa, the United States on behalf of different bands of Chippewa Indians, a tribe recognized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., has brought several lawsuits against the State of Minnesota to reinstate Indian treaty rights deemed extinguished by all parties from the 1890's to 1970. Mille Lacs is the latest seeking to reinstate the hunting, wild rice gathering and fishing rights. So far for the Chippewa, the United States has participated in more than six suits in Minnesota and Wisconsin for the Chippewa which displace the regulatory powers of those states to administer the hunting, gathering and fishing rights on state and private lands.

Minnesota and Wisconsin are not public land states with vast amounts of federal land available for withdrawal or reservation. The use of the term "reservation" as to the Mille Lacs Band is a misnomer. The "reservation" designation flows from the fact that some Indians still own land and the Band has purchased land within the original boundaries of the reservation expressly terminated by the Nelson Act of 1889, ch. 24, 25 Stat. 642. The United States refers to the Mille Lacs "reservation" because it asserts that the 1837 treaty rights still exist. The United States claims that the possible existence of an unextinguished Indian treaty right requires a court to find that these privately owned lands are "Indian country" and therefore are "Indian territory" entitling the Indian Band to protection of their treaty right under the Treaty Clause, Art. II, Sec. 2 and thereby the Supremacy Clause, Art. Vl, Cl. 2. This argument in effect creates permanent reservations with sovereign rights at least equal if not actually superior to the states. See *Leech Lake Band of Chippewa v. Cass County* briefs.

ARGUMENT

I.

INTRODUCTION

The Mille Lacs decisions of the Eighth Circuit conflict with the decisions of this Court in *South Dakota v. Bourland*, 508 U.S. 679 (1993) and *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) which interpret the extinguishment of Indian lands as also being an extinguishment of Indian Treaty claims. The *Yankton Sioux* argument presented by the United States for the tribe was very similar

to the reasoning used in this case. The Eighth Circuit ruled for the tribe in that case as well. Just as the Eighth Circuit was overruled in *Yankton Sioux*, so should it be in this matter. As *Yankton Sioux* observed, these cases fall within a line of termination cases which began with *DeCoteau v. District County Court*. See, e.g., *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

The *DeCoteau* Court determined that the State of South Dakota possessed jurisdiction because the reservation had been extinguished and could not be "restored" by the Secretary. In overruling the Eighth Circuit, the Court established the process used to determine whether the use and occupancy rights of the Tribe were terminated. *DeCoteau*, 420 U.S. at 442-47. For the first time, the court distinguished between extinguishment acts and surplus lands acts. A conclusion of termination indicates permanent extinguishment of all tribal interest in the land. For the lands in question, the compliance with the Nelson Act met this exacting standards, as well as the standard expressed in *Hagen v. Utah*, 114 S.Ct. 958 (1994), for the disestablishment of "Indian country." Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). The Nelson Act is the Minnesota version of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, §§ 5 and 6.

The Eighth Circuit discussion of the Nelson Act is based upon an error which fails to acknowledge the impact of *Hagen v. Utah*, on the *Seymour v. Superintendent* interpretation of the criminal statute defining "Indian country." Compare 18 U.S.C. § 1151 (1994) with *Hagan v. Utah*, 114 S.Ct. 958 (1994) and *Seymour v. Superintendent*, 368 U.S. 351 (1962). As the recent *Native Village of Venetie* decision makes crystal clear, the definition of the "Indian country" requires a federal set aside of land. In this case

there is no federal set aside of these lands upon which the hunting, gathering of wild rice and fishing is supposed to take place. In 1971, the federal district court of Minnesota in *Leech Lake Band v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971), inappropriately relied on *Seymour* to hold that the 1855 Treaty with the Chippewa was not extinguished by the Nelson Act. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D.Minn. 1971); see, e.g., *Leech Lake Band v. Cass County*, 108 F.3d 821 (opinion by Judge Murphy); *Mille Lacs Band of Chippewas v. Minnesota*, 861 F. Supp. 784 (1994) (same); *Mille Lacs Band of Chippewas v. Minnesota*, 853 F. Supp. 1118 (1994) (same). The Eighth Circuit since 1971 has consistently held that the usufructuary treaty rights specifically recognized in the treaty of 1837 were not extinguished by the termination of the 1855 treaty rights because the acts of Congress and express language of the President were not made sufficiently clear to the Chippewa. The Eighth Circuit has always addressed the extinguishment from the perspective of the Indians' understanding, based on the United States' trust responsibility, and never addressed whether a power to restore Indian treaty rights not reserved at statehood exists under the Constitution of the United States.

By relying on "Indian country" as an exemplar of tribal sovereignty, the Eighth Circuit ignored the principle that "Indian country" has no relevance to an express extinguishment act of Congress and can provide no limitation thereto. See *Hagen v. Utah*, 114 S.Ct. at 967. The Eighth Circuit, without expressly citing the law of the case or res judicata, has continued to use its 1971 precedent of *Herbst* for all Chippewa cases proceeding after the initial Leech Lake Band decision. In doing so, the Eighth

Circuit has completely avoided applying the extinguishment line of cases to any of the Chippewa Bands claims, including Mille Lacs. The new decisions of *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) and *State of Alaska v. Native Village of Venetie*, 1998 WL 75038 (U.S.), 118 S.Ct. ___ (1998) directly contradict the Eighth Circuit land status rationale as to treaty rights extinguishment and "Indian country" respectively.

In no way can the Nelson Act be construed as anything but a disposal act. The Nelson Act disposed of all lands which had been reserved for the Leech Lake Band and the Mille Lacs Band, under allotments, timber sales or homesteads. 25 Stat. 642. The Eighth Circuit Court of Appeals' extrapolation of the initial *Herbst* error to prevent the lawful operation of a proper disestablishment act only makes the error more needful of correction. Judge Murphy's expansive view of treaty cases which are no longer proper precedent led her to prevent extinguishment of treaty rights, where the disestablishment act required relinquishment of all right, title, and interest to the reservation. The Eighth Circuit has not reviewed the first impression ruling of *Leech Lake Band v. Herbst* after the case law on extinguishment developed in higher courts. The fundamental shift in higher precedent leaves the Eighth Circuit on uncertain ground and in need of redirection.

II.

DISPOSAL OF THE TERRITORIES IS A REQUIREMENT WHICH PROTECTS FEDERALISM.

Congressional power over territorial lands was meant to be temporary. As the Constitution provides,

"Congress shall dispose of the Territories . . . " U.S. Const., Art. IV, Sec. 3, Cl. 2. The principle mandating disposal has long been upheld by this Court. See *U.S. v. Midwest Oil*, 236 U.S. 459 (1915); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), *U.S. v. Gratiot*, 39 U.S. (14 Pet.) 525 (1840). In other areas, Congress itself recognized the temporary nature of its regulatory authority. See Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. Additionally, this Court recently required specific congressional action to create permanent reservations in a state. *Alaska v. United States*, 117 S.Ct. 1888 (1997); see also *New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Ct.App.1992) (affirming in part, and on Property Clause grounds, 783 F. Supp. 633 (D.D.C.1992)).

Congress expressly terminated the Mille Lacs reservation with the Nelson Act. After the 25 year trust period expired, the Mille Lacs tribal rights to these lands and all of the rights upon these lands were extinguished. The United States, through the Clinton Administration, is attempting to subvert the old cases of *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810) and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) and fundamentally alter the sovereignty balances set by the Constitution. The United States acknowledged, in the Treaty with the Chippewa of 1855, that it held sovereign title to the lands under the Property Clause, Art. IV, Sec. 3 and that the Bands held only "Indian title." This "Indian title" gave only a right to use and occupy the land until the right was terminated by Congress. "Indian title" has been transformed by clever legal wording referring to the lands as "Indian territory" into a full sovereign claim over the land. Congress has given the tribes many powers of self-government but has

never linked the powers to land status. The power Congress has allowed the tribes flows completely from Congress. Any delegation of authority is revocable at will because there is no sovereign connection to the "Indian territory." The Clinton administration is literally attempting to expand the definition of the word "territory" just as they have expanded the definition of "reservation" into any lands where any Indians live.

Whatever Indian sovereignty existed in the Mille Lacs Band was determined by the Treaty and is entirely subject to the plenary authority of Congress. *United States v. Kagama*, 118 U.S. 375 (1886). Even under the Treaty of 1855, the Mille Lacs Band was not the supreme sovereign over this land. The Treaty acknowledged the territorial sovereignty of the United States. From 1855 until the termination of the reservation by the Nelson Act in 1889 – with the disposal by sale of the lands – these lands were federal reserved public domain lands. Arguably until the 25 year trust period expired for the final sales and disposition of the lands, the United States retained territorial jurisdiction against the states on the allotted lands acquired by Indians. The State of Minnesota accepted jurisdiction and exercised full jurisdiction over former Chippewa lands under the Nelson Act until 1971 when in a case of first impression, the federal district court erroneously concluded that the Nelson Act was not a termination of the usufructury treaty rights of the Leech Lake Band of Chippewa.

Although asserted under the guise of unextinguished treaty rights, this case is merely a variation on a theme – the United States attempting to forcibly displace state jurisdiction. There is no practical difference between an

Indian tribe reacquiring lands by purchase or by asserting a claim to an extinguished treaty right. Tribal purchase of lands in fee simple alone does not divest state jurisdiction. It is only the interpretation the United States has placed on its General Welfare/Spending Clause, Art. 1, Sec. 8, Cl. 1, trust responsibility through the Indian Reorganization Act and the Indian Self-Determination Acts which purport to dispossess state jurisdiction. This argument is fully made to the Court in an Amici Curiae Brief submitted by CERA in the current Leech Lake case. The questions presented in this case demonstrate an overall problem with judicial review created in the *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) decision. That problem stems from the two holdings which dealt specifically with the Court declining to protect constitutional rights in territories of the United States and the use of the political question to prevent the Court from ever revisiting the perpetuation of slavery in the territories.

Although the Thirteenth Amendment effectively overruled the first holding in *Scott v. Sandford* concerning the ability to make freed Negro citizens, the rest of the majority decision has been left completely intact. To this day the Court has never reexamined its authority in the territories. Constitutional rights still do not apply to persons residing on lands subject to the plenary authority of Congress under the Property Clause. This is precisely the result the Founding Fathers attempted to prevent with the structure of the Constitution because they had fought the Revolutionary War to gain full citizenship rights for the former territorial colonies of Great Britain. As George Mason, the most prominent Anti-federalist, predicted in his speech to the Constitutional Convention, because of slavery, this very carefully constructed structural balance

to protect the People's rights would not hold. He demanded a Bill of Rights and the battle for ratification began. It is hard to believe that more than two hundred years later we are still having the same fight, especially after such a costly Civil War. The Civil War did result in the Amendments needed to fix the territorial problem. It also resulted in a virtually completely Federalist victory. Even though the Southern States gave three major chances to the Supreme Court to apply the Fourteenth Amendment against the territorial war powers, three times the Court declined and used the rationale of *Scott* without citing to the actual decision to deny jurisdiction. *State of Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868); and *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

It is not the purpose of this brief to question the result of the Civil War. The purpose is to question why the Supreme Court has never placed the will of the People in the passage of the Civil War Amendments back into the dominant position in the structural balance. To this day, the definition of "sovereign people" in Black's Law Dictionary is still the perverted definition from *Scott v. Sandford*. No group of people has been more victimized by this inaction on the part of the Supreme Court than the Indian people. The Indian people, although called citizens because of the Naturalization Act of 1924, 8 U.S.C. § 1401, only have rights when they are not on territorial lands. How much of this result flows from the fact that the Indian cases of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *In re Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) became a major part of the Reconstruction Act debate will be left for historians to decide if the result is ever altered by this Court. Certainly, the words of Justice

Davis in *In re Kansas Indians* quoting the 1854 Treaty with the Shawnee have been ignored. "It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from state taxation." Id. at 756. Indian citizenship has not changed the willingness of the Court to confront the territorial war powers.

Under the current United States perspective, Indian treaties were made outside of the territorial boundaries of the United States. Congress has never passed any act for or against the Indian tribes which disclaims territorial jurisdiction of the United States over lands currently or formerly occupied by Indian tribes. This argument asserted by the Executive Branch attempts to displace Congress' plenary power over the Indian tribes and its Property Clause authority. Instead, it places a potentially unlimited power to reinstate treaties within the territorial boundaries in the Executive Branch under the Department of Justice. These reinstated treaties hope to displace state jurisdiction by reasserting the Supremacy Clause to both reinstate the Indian property rights and to attach Indian sovereignty rights to the land. Although this Court has a long history of avoiding applying the Fourteenth Amendment to Indian cases because of the direct conflict between the Fourteenth Amendment protections and the Property Clause's inherently unaccountable powers, the reinstatement of treaty rights without examining the Fourteenth Amendment consequences goes too far.

The United States asserts it is merely protecting tribal interests by reasserting these treaty rights. However, the United States' claim that these reasserted treaty rights are

treaties under the terms of the Supremacy Clause entitled to assertion as the supreme law of the land creates an ability to completely displace state law. The Supremacy Clause requires that the treaty be made under the authority of the United States Constitution to be the supreme law of the land. The adoption of the Fourteenth Amendment in 1868 essentially prevented any more treaties from being negotiated with the Indian tribes. There is no doubt that at the time of negotiating and ratifying the Indian treaties, the United States used the treaties primarily to negotiate land cessions. The 1855 Treaty with the Chippewa was a treaty of cession. These land cessions were originally executed under the authority of the Treaty Clause. However, the power to administer the lands as territory was in the Property Clause.

The Treaty Clause defines a mandatory process, necessary to create a treaty. It carefully separates and balances the power of the Executive Branch to enter into international agreements against the power of Congress to make domestic law. There is no point of having a constitution to limit the domestic powers of the federal government if the international powers are unlimited and superior to domestic law. The United States is incorrect in asserting that the Supremacy Clause creates such a result. Entering into a treaty does not alter the doctrines of separation of powers or checks and balances. The decision to enter a treaty requires both the President and the Senate for ratification. The treaty power is a very carefully constructed political process. The Executive can enter a treaty which then is not ratified by the Senate, rendering the treaty null and void. The most famous example of this was President Wilson and his League of Nations inclusion at the end of World War I which failed

ratification in the Senate. This political decision was not subject to judicial review. It is an inherently political decision whether a treaty passes this constitutional process.

Reinstating a treaty cannot be done by the courts under the Treaty Clause because it violates the political process created in the clause. The treaty power does not bestow upon the courts any authority except to review whether the other branches adhered to the required process. The power being asserted by the Eighth Circuit to restore the 1837 Treaty is actually derived from the Property Clause. To allow reinstatement of treaties, judicial review must include the ability to overrule an express political decision to extinguish or terminate Indian reservations made by Congress to dispose of the public domain lands. No party in this case has questioned the constitutionality of the Nelson Act. Again, the courts undoubtedly possess the power to review whether the disposal act contained sufficient process to protect constitutional rights. The courts as demonstrated by *DeCoteau* and the whole line of extinguishment cases, may set due process requirements which Congress must meet. Lands not properly disposed may still have Indian treaty rights attached subject to the plenary authority of Congress to remedy. However, ensuring due process is not an exercise of an affirmative power to restore Indian rights over land specifically disposed. This is a power not contained in Art. III.

While Art. III does allow judicial review to determine if property rights were taken or civil rights were violated by the United States in extinguishing a treaty, the power does not extend to review of the political decision to terminate. This includes not only the power of Congress under the Property Clause but also the power of the Executive under the Treaty Clause. In this case, the Eighth

Circuit actually managed to violate separation of powers against both other branches by reinstating the treaty against an express termination by Congress and by ignoring the President's exercise of properly and expressly delegated power to terminate the 1837 treaty privileges. The fact that Indian policy was altered subsequently does not affect the fact the President ended the privilege.

The United States Supreme Court correctly ruled in the extinguishment line of cases starting with *DeCoteau v. District County Court* that the extinguishment is examined from the Intent of Congress at the time of passage of the disposal act. The Eighth Circuit erred in examining the Mille Lacs treaty claim from the United States perspective that the Nelson Act should be interpreted based upon present law. The Eighth Circuit should have followed the extinguishment line of cases and ruled that the treaty rights were extinguished. By following the United States perspective, the Court became the instrument to impose an ultra vires restriction on Minnesota's jurisdiction to regulate hunting, fishing and wild rice gathering on state and private lands.

III.

THE PURPOSE OF JUDICIAL REVIEW IS TO PROTECT THE RIGHTS OF THE PEOPLE FROM USURPATION BY GOVERNMENT.

The case at bar is an excellent example of how the Court's order does not completely divest Minnesota of jurisdiction – it compels Minnesota to exercise its regulatory authority in a manner defined by the court. The Eighth Circuit ordered the State of Minnesota to enter an agreement with the Mille Lacs Band, placing the tribal "treaty" rights ahead of all other use rights on Mille

Lacs.[2] This type of court order is the worst sort of federal mandate. See *Leech Lake Citizens Committee v. Leech Lake Band of Chippewa Indians*, 355 F. Supp. 697 (D. Minn. 1973). Certainly, the constitutional reasoning is identical to that asserted by Congress to compel specific state regulatory action. See, e.g., *Printz v. United States*, 117 S.Ct. 2365 (1997), *New York v. United States*, 505 U.S. 144 (1992). This result is just as unconstitutional as a federal mandate which compels a state to regulate a specific way according to a federally funded program.

It is particularly disturbing to see a federal court caught in this separation of powers violation. An Article III court must protect the rights of all the people in an unbiased manner. The credibility of the courts depends on the people believing they are fair and impartial in the protection of constitutional rights. Part of that responsibility is ensuring that the elected representatives of the People may politically be held accountable by the People. When government policy based on territorial power favors a minority over the majority, the People literally have no right to even question the authority in court and cannot hold their elected representative accountable for discrimination which occurs outside of their district. It is a true "slippery slope" problem because by the time the discrimination hits the majority, it is too late to remedy the initial claim of territorial power. The perfect example of this assertion is in *Kansas v. Colorado*, 206 U.S. 46 (1907) discussing the Property Clause power against the Tenth

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[2] This agreement will survive the Leech Lake ruling of this Court unless a direct order issues requiring the Eighth Circuit to review its Mille Lacs rulings based upon the decisions of the current term.

Amendment concerning the Reclamation Act of 1902, 32 Stat. 388.

> "These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation." *Kansas v. Colorado*, 206 U.S. at 92.

It only takes a reading of the Clean Water Act, 91 Stat. 1566, 33 U.S.C. § 1251, et seq., and its amendments to realize that this judicially approved discrimination against the Western States has now spread to include all

of the States in regards to wetlands and tribal grants of authority to regulate, 33 U.S.C. § 1377 of the Clean Water Act, under the same power analysis as the Reclamation Act.

The Mille Lacs decisions, like the Leech Lake decisions, hold that the United States is not accountable for placing the rights of the Mille Lacs Band ahead of the rights of the majority of the citizens of the State of Minnesota. The decisions make it seem this is a proper role for the federal government instead of the extra-constitutional action it is.

Federalism is the separation of powers doctrine which protects the states from intrusions by *any* of the federal branches on powers reserved to the states. It is unusual that this intrusion is from the Judicial Branch because of the limitations placed in Art. III. This is not an original jurisdiction action which grants very broad authority to this Court on very limited subjects. The Eighth Circuit is claiming appellate jurisdiction includes an affirmative constitutional power to act to remedy the disposal of the Mille Lacs reservation.

There is no constitutional power which allows the United States Congress or any other branch of the federal government to unilaterally divest state jurisdiction and to make it federal except under direct war power authority. The intent of the disposal of the public domain was to create states to prevent the territorial war powers from becoming perpetual. Throughout the discussions of the overall effect of the territorial powers was a great concern articulated by the Anti-federalists about maintaining a standing army. No group of persons understood that constitutional rights were not recognized in a territory

because of the war power authority under English common law better than the men that started our Revolutionary War and drafted this Constitution. They specifically worded Art. IV, Sec. 3 to place the creation of states in Clause 1 ahead of the compelled disposal of the territory in Clause 2. These clauses have been erroneously interpreted separately for too long. The first Clause is an express limitation on the second.

Ultimately, the reinstatement power is a question of the nature of judicial review. If judicial review is primarily to protect the People's rights then the People are the supreme sovereign. If judicial review was intended to further the power of the national government, then the government is the supreme sovereign. Under the first analysis the courts are accountable to the People to protect their rights. Under the second analysis the courts become the most dangerous branch of government to the People. In point of fact, this second result has happened because the trial courts do not examine the constitutionality of a federal mandate before they apply it to a father delinquent on child support or to protect the rights of a part Indian child to be with the only parents the child has ever known.

The Court must decide the nature of judicial review in either this case or apply its decision on this fundamental question from the *Leech Lake v. Cass County* case already before this Court. The Fourteenth Amendment confrontation with the Property Clause power is ripe and must be decided before lower courts, both state and federal, lose all credibility by refusing to hear cases because they must overrule federal mandates that contribute major amounts of money to state budgets. No trial judge can take on the responsibility for terminating state

funds without major support from the United States Supreme Court that it must be done to protect civil rights.

CONCLUSION

The decisions of the Eighth Circuit Court of Appeals should be reversed. This Court should grant the petition to allow this correction and to address the important judicial review question presented by the Eighth Circuit not reviewing its 1971 precedent against a whole line of Supreme Court decisions to the contrary.

Respectfully submitted,

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Nos. 97-1337, 97-1356, and 97-1357

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

COUNTY OF AITKIN, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

JOHN W. THOMPSON, ET AL., PETITIONERS

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the usufructuary rights guaranteed to the Chippewa Indians on aboriginal lands that they ceded to the United States by an 1837 Treaty were terminated by the operation of the equal footing doctrine when Minnesota was admitted to statehood in 1858.

2. Whether an 1855 Treaty, in which one of the respondent Chippewa Bands, the Mille Lacs Band, relinquished "all right, title, or interest" in and to its remaining lands other than those set aside for its Reservation, extinguished that Band's usufructuary rights under the 1837 Treaty.

3. Whether an Executive Order issued in 1850, which ordered the involuntary removal of the Chippewa from the lands ceded by the 1837 Treaty, extinguished their usufructuary rights with respect to those lands.

4. Whether the various respondent Chippewa Bands are precluded, as a result of their participation in proceedings before the Indian Claims Commission, from asserting their usufructuary rights under the 1837 Treaty.

5. Whether the Chippewa Indians' exercise of usufructuary rights under the 1837 Treaty should be limited by the "moderate living" doctrine of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-73) is reported at 124 F.3d 904. The opinions of the district court are reported at 853 F. Supp. 1118 (*Mille*

Lacs I) (Pet. App. 351-418), 861 F. Supp. 784 (*Mille Lacs II*) (Pet. App. 212-350), and 952 F. Supp. 1362 (*Mille Lacs III*) (Pet. App. 74-163). Additional opinions of the district court (Pet. App. 164-211 and 419-481) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1997. A petition for rehearing was denied on November 17, 1997. Pet. App. 7. The petition for a writ of certiorari in No. 97-1337 was filed and docketed on February 17, 1998, the day after a federal holiday. The petitions for a writ of certiorari in No. 97-1356 and No. 97-1357 were filed on February 17, 1998, and docketed on February 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns whether the Chippewa Indians' rights to hunt, fish, and gather wild rice on aboriginal tribal lands—"usufructuary" rights expressly preserved by a treaty ceding those lands to the United States—were subsequently relinquished by the Tribe or abrogated by the United States. The same rights under the same treaty were before the Seventh Circuit in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, cert. denied, 464 U.S. 805 (1983), which concluded, consistent with the Eighth Circuit's decision in this case, that the Chippewa Indians continued to possess those rights.

1. The lands involved in this case are the Minnesota portion of a tract, totalling more than 13 million acres, that the Chippewa Indians ceded to the United States by the Treaty of July 29, 1837, 7 Stat. 536 (Pet.

App. 484).[1] (The remainder of the tract, which lies in Wisconsin, was the subject of *Lac Courte Oreilles Band.*) The 1837 Treaty provided that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." Art. 5, 7 Stat. 537. The Treaty contained no provision for the removal of the Indians from the ceded lands.

On February 6, 1850, President Taylor issued an Executive Order that stated, in pertinent part:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States * * * are hereby revoked; and all of the said Indians remaining on the land ceded aforesaid, are required to remove to their unceded lands.

Pet. App. 253.

The United States did not attempt to forcibly remove the Chippewa from the ceded lands. The government did, however, seek to induce the Indians to relocate by moving the Chippewa agency, where the Indians received their annuity payments, to unceded lands some distance from the ceded lands. Pet. App.

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[1] All "Pet. App" citations refer to the appendix to the petition in No. 97-1337. The petition in No. 97-1337 is cited as "Minn. Pet.," the petition in No. 97-1356 as "County Pet.," and the petition in No. 97-1357 as "Thompson Pet."

257. But the Chippewa remained on the ceded lands. And, in 1851, the Acting Secretary of the Interior suspended the removal effort. *Id.* at 260-261. It was never resumed. *Id.* at 264.

In 1854, the United States negotiated a treaty that provided for the cession to the United States of all of the remaining lands occupied by the Lake Superior Chippewa east of the Mississippi and established reservations for the Chippewa Bands within the lands ceded by the 1837 Treaty and by a second treaty negotiated in 1842. Treaty of Sept. 30, 1854, 10 Stat. 1109. The 1854 Treaty reserved the signatory Bands' right to hunt and fish on the newly ceded lands. The respondent Fond du Lac and Wisconsin Bands of Chippewa Indians were parties to the 1854 Treaty; respondent Mille Lacs Band was not.

The United States negotiated a second treaty in 1855 to acquire additional lands of the Chippewa, including the Mille Lacs Band. Treaty of Feb. 22, 1855, 10 Stat. 1165. Article I of the 1855 Treaty, after ceding all of the Bands' right, title, and interest in a tract with defined boundaries, went on to state that

> the Indians do further fully and entirely relinquish and convey to the United States any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to, any other lands in the Territory of Minnesota or elsewhere.

10 Stat. 1166. Article II of the 1855 Treaty established the Mille Lacs Reservation within the territory ceded by the 1837 Treaty. 10 Stat. 1166-1167. The 1855 Treaty made no mention of usufructuary rights.

2. In 1990, the Mille Lacs Band and several of its members filed suit in federal district court against the State of Minnesota, seeking a declaratory judgment that they continued to possess usufructuary rights with respect to the Minnesota portion of the lands ceded in the 1837 Treaty. They also sought an injunction against the State's interference with those rights. The United States intervened as a plaintiff, and nine Minnesota counties and six individual landowners intervened as defendants.

The court bifurcated the case into two phases: the first was to determine whether, and to what extent, the Chippewa retained usufructuary rights on the ceded lands, while the second was to determine how any such rights were to be exercised. In 1994, the court concluded, after a trial on the first phase, that "the privilege guaranteed to the Chippewa of hunting, fishing, and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded to the United States by the treaty of 1837 continues to exist." Pet. App. 350. The court specifically held that those rights were not extinguished by the 1850 Executive Order or the 1855 Treaty. See *id.* at 304-334.

The court then allowed several Wisconsin Bands of Chippewa to intervene as plaintiffs. The State moved for summary judgment against the Wisconsin Bands, arguing, *inter alia*, that their usufructuary rights had been extinguished by the 1854 Treaty. The State also argued that the Wisconsin Bands were collaterally estopped from asserting their usufructuary rights claims as a result of their participation in previous litigation before the Court of Claims and the Indian Claims Commission. The court denied the State's motion. Pet. App. 164-211.

The Fond du Lac Band, and several of its members, had filed a separate suit in 1992, seeking a declaration that they retained the usufructuary rights conferred by the 1837 Treaty and the 1854 Treaty. In 1996, the district court held that the Fond du Lac Band continued to possess its usufructuary rights under both treaties. Pet. App. 419-481.

The Fond du Lacs suit was consolidated with the Mille Lacs suit for the second phase of the case. The State and the Bands stipulated to a Conservation Code and Management Plan to regulate the exercise of usufructuary rights under the 1837 Treaty. The district court also resolved certain other issues that remained in dispute, concluding, among other things, that the defendants had demonstrated no need for an allocation of the resources on the ceded land. Pet. App. 128-152.

3. The State, together with the intervening counties and landowners, appealed. The court of appeals affirmed on all issues. Pet. App. 1-73.

First, the court concluded that the Chippewa's usufructuary rights were not validly extinguished by the 1850 Executive Order, which purported to revoke those rights and to require the removal of the Chippewa from the ceded lands. Pet. App. 21-31. The court explained that President Taylor had no authority to order the removal of the Chippewa without their consent, because Congress had authorized the President only to convey lands west of the Mississippi to "such tribes or nations of Indians as *may choose* to exchange the lands where they now reside, and remove there." Act of May 28, 1830, ch. 148, § 1, 4 Stat. 412 (emphasis added). Accordingly, because "Congress required consent for removal, and the Bands did not consent, then President Taylor had no authority for

his 1850 Executive Order of removal." Pet. App. 27. The court further determined that the portion of the Executive Order mandating removal of the Chippewa was not severable from the portion revoking their usufructuary rights, finding "no evidence that revocation of usufructuary rights would have been made independently of the removal mandate." *Id.* at 29-30. The court therefore held that "the entire 1850 Executive Order is invalid." *Id.* at 31.[2]

Second, the court of appeals held that the 1854 Treaty, which set aside certain lands as reservations for the Wisconsin Bands and the Fond du Lac Band (but not the Mille Lacs Band) in exchange for their cession of title to other lands, did not extinguish those Bands' usufructuary rights under the 1837 Treaty. Pet. App. 31-34. The court concluded that the present case is legally and factually distinguishable from *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339, 357-358 (1941), which held that a Tribe's acceptance of a reservation "amounted to a relinquishment of any tribal claims to lands * * * outside that reservation." The court explained that, whereas the Indians' claim in *Santa Fe* was based on aboriginal title, the Chippewa's claim here is based on rights reserved under the 1837 Treaty. Pet. App. 33. The court also found the evidence to be "overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights." *Id.* at 34.

Third, the court of appeals held that the 1855 Treaty, which created a reservation for the Mille

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[2] The court of appeals did not address the district court's several alternative grounds for finding that the 1850 Executive Order did not validly revoke the Chippewa's usufructuary rights. Pet. App. 31 n.25.

Lacs Band on some of the lands ceded by the 1837 Treaty, did not extinguish that Band's rights to fish, hunt, and gather wild rice on the rest of those lands. Pet. App. 34-39. The court declined to construe the Band's relinquishment of "any and all right, title and interest" in and to "any other lands in the Territory of Minnesota" as extending to the usufructuary rights reserved under the 1837 Treaty. *Id.* at 35. The court noted that those rights were not mentioned in the 1855 Treaty or in the negotiations that produced it. *Id.* at 37. And the court found ample support in the record for the district court's factual findings that neither the Band nor the United States had intended the 1855 Treaty to extinguish those rights. *Ibid.* The court concluded that a contrary result was not required by *Oregon Department of Fish & Wildlife* v. *Klamath Tribe*, 473 U.S. 753 (1985), which held that a Tribe had relinquished its right to hunt and fish on certain reservation lands when it ceded all "claim, right, title and interest" in those lands. Pet. App. 38. The court explained that the usufructuary rights in *Klamath* were "exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation," whereas the usufructuary rights in this case are "*non-exclusive* and *off-reservation* rights" that were reserved by treaty prior to the creation of the reservation. *Id.* at 39.

Fourth, the court of appeals concluded that the Wisconsin Bands and the Fond du Lac Band were not collaterally estopped, as a result of their participation in *Mole Lake Band* v. *United States*, 126 Ct. Cl. 596 (1953), from litigating whether they retain a right to fish, hunt, and gather wild rice on the lands ceded by the 1837 Treaty. Pet. App. 39-45. The court held that

collateral estoppel did not apply because the Bands' usufructuary rights under the 1837 Treaty were not "actually litigated" in the Court of Claims. *Id.* at 43-44.

Fifth, the court of appeals held that the Wisconsin Bands and the Mille Lacs Band likewise were not collaterally estopped as a result of their participation in proceedings before the Indian Claims Commission seeking compensation for lands ceded under the 1837 Treaty. Pet. App. 45-51. The court rejected the argument that the Commission's award, which compensated the Bands based on the highest and best use of those lands, subsumed the value of the Bands' usufructuary rights. The court concluded that the Commission's silence with respect to usufructuary rights could not be given the same effect in this case as in *Klamath*, *supra*, reasoning that the Commission would not have "extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." *Id.* at 50.

Sixth, the court of appeals held that the Bands' usufructuary rights under the 1837 Treaty were not extinguished, sub silentio, under the equal footing doctrine when Minnesota was admitted to statehood in 1858. Pet. App. 52-59. The court, while applying the analysis of *Ward* v. *Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), reached a different result on several grounds. The court reasoned that, whereas the hunting rights in those cases were "temporary" because they could be exercised only so long as the lands at issue remained unoccupied and within the ownership of the United States, the usufructuary rights in this case are of a

"continuing" nature not tied to ownership of the lands. Pet. App. 55 & n.42. The court also concluded, relying on this Court's decisions in *United States* v. *Winans*, 198 U.S. 371 (1905), and *Tulee* v. *Washington*, 315 U.S. 681 (1942), that the United States' agreement in the 1837 Treaty to preserve the Chippewa's usufructuary rights on the ceded lands "does not offend the State's sovereignty." Pet. App. 58. The court further held that Congress must clearly express its intent to abrogate Indian treaty rights, and that no such expression of congressional intent to abrogate the Chippewa's rights under the 1837 Treaty was contained in the Act of Congress admitting Minnesota to statehood. *Id.* at 59.

Seventh, the court of appeals rejected the argument that the "moderate living doctrine," as articulated in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), should be applied to limit the Chippewa's exercise of usufructuary rights under the 1837 Treaty. Pet. App. 59-67. The court explained that the moderate living doctrine is not implicated unless, as in *Fishing Vessel*, a natural resource is determined to be so scarce that it must be apportioned between treaty and non-treaty users: "The moderate living doctrine does not establish a *right* to apportionment, but is rather a part of the *method* of apportionment once a court has determined that division of a resource is necessary." Pet. App. 67 (citing *Fishing Vessel*, 443 U.S. at 685-686). The court concluded that no showing had been made that "any resource at issue is in ecological danger," and thus in need of apportionment between the Chippewa and other users. *Id.* at 65. The court noted that the State and the Chippewa had agreed to a Conservation Code and Management Plan, which

would restrict the Band's hunting, fishing, and gathering on the ceded lands covered by the 1837 Treaty, and that the State had conceded that "under the Code, there was no danger of depletion of resources." *Ibid.*

Finally, the court of appeals, rejecting the Bands' cross-appeal, affirmed the district court's holding that, because the 1837 Treaty does not confer a right of access to land, the Bands' members may exercise their rights only on public lands and on private lands that are open to public hunting, fishing, and gathering generally and indiscriminately. Pet. App. 70-72.

ARGUMENT

The court of appeals' decision involves nothing more than the application of settled law to the particular facts and circumstances of this case. It does not conflict with any decisions of this Court, other courts of appeals, or the Minnesota Supreme Court. Indeed, the Seventh Circuit reached the same result in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, cert. denied, 464 U.S. 805 (1983), which sustained the Chippewa's usufructuary rights under the same treaty. No more reason exists in this case than in *Lac Courte Oreilles Band* for this Court to grant plenary review.

1. The State initially contends (Minn. Pet. 10-15) that the decision below conflicts with *Ward* v. *Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), in holding that the Bands' usufructuary rights under the 1837 Treaty were not abrogated when Minnesota was admitted to the Union on an equal footing with other States. The Eighth Circuit applied the same legal standard to petitioners' equal footing claim as did this Court in *Race Horse* and the Tenth

Circuit in *Repsis*. However, because the facts and circumstances of this case are different from those of *Race Horse* and *Repsis*, the court correctly reached a different conclusion.

This Court explained in *Race Horse* that, when an Indian Tribe possesses treaty rights with respect to lands not yet within any State, whether those rights continue to exist after statehood depends upon their character: The Tribe's rights survive if they "are of such a nature as to imply their perpetuity," as opposed to being "temporary and precarious." *Race Horse*, 163 U.S. at 515; accord *Repsis*, 73 F.3d at 988. The Tribes' treaty rights in *Race Horse* and *Repsis* "to hunt upon the unoccupied lands of the United States" were held to be "temporary" in nature. 163 U.S. at 515; 73 F.3d at 991.

The court of appeals applied *Race Horse*'s continuing/temporary distinction in this case. But the court concluded that the Chippewa's treaty rights to "hunt[], fish[] and gather[] the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" were intended by the parties to be "continuing rights." Pet. App. 55. The court contrasted the rights at issue here with those in *Race Horse* and *Repsis*, which would terminate, by their terms, as soon as the lands were no longer "unoccupied" or owned by the United States. Such a fact-specific determination, which turns on the particular text and history of the 1837 Treaty, does not warrant review by this Court. See *Repsis*, 73 F.3d at 988 (recognizing that whether Indian treaty rights have survived statehood under *Race Horse* requires examination of "the literary and historical context of the treaty").

The court of appeals' decision is consistent, moreover, with this Court's post-*Race Horse* decisions.

The Court has recognized, for example, that the Yakima Indians' treaty right to "tak[e] fish at all usual and accustomed places" survived Washington's admission to the Union. *United States* v. *Winans*, 198 U.S. 371, 382-384 (1905); see *Tulee* v. *Washington*, 315 U.S. 681, 684 (1942) (*Winans* held that the treaty "conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area"). The Court emphasized that the Yakima's fishing rights were reserved by, not granted to, the Indians in the treaty. See *Winans*, 198 U.S. at 381 ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."). It was "surely * * * within the competency" of the federal government, said the Court, "to secure to the Indians such a remnant of the great rights they possessed." *Id.* at 384. The Court added that such a reservation of rights would not "restrain the State unreasonably, if at all," in its regulation of its natural resources. *Ibid.* Similarly, the court of appeals recognized here that the Chippewa's reservation of the right to fish, hunt, and gather on the lands ceded by the 1837 Treaty "does not offend the State's sovereignty," because "the Bands' rights can be reconciled with the State's regulation of the natural resources within its borders." Pet. App. 58.[3] See also *Antoine* v. *Washington*, 420

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[3] The continuing vitality of *Race Horse*'s rationale has been questioned by courts and commentators. See, *e.g.*, *Holcomb* v. *Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967) ("[T]he strict holding of *Ward* v. *Race Horse* has been modified by implication in subsequent decisions."); *State* v. *Tinno*, 497 P.2d 1386, 1393 n.6 (Idaho 1972) ("*Race Horse* and the theory it posited have been entirely

U.S. 194, 205-206 (1975) ("Congress exercised its plenary constitutional powers to legislate those federally protected rights, * * * * [which] so preserved may, of course, not be qualified by the State") (internal quotation marks omitted).[4]

Moreover, notwithstanding *Race Horse*, this Court has made clear over the past century that hunting regulations are an appropriate subject of federal legislation and treaty making, and that the federal government's exercise of such power in any given State does not place that State on an unequal footing. For example, in *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 (1976), the Court rejected a claim that federal regulation of wild horses and burros, pursuant to the Property Clause, impermissibly intruded "on the sovereignty, legislative authority, and police power of the State." When legislating regarding federal lands, the Court explained, Congress's enactments "necessarily override[] conflicting state laws under the

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discredited by the Supreme Court") (citing *United States* v. *Winans*, and *Tulee* v. *Washington*, *supra*); R.N. Clinton, et al., *American Indian Law* 820 (3d ed. 1991) ("*Winans* clearly rejected the view that the equal footing doctrine limits the exercise of treaty-guaranteed off-reservation hunting and fishing rights.").

[4] In *Antoine*, unlike in *Race Horse*, the State was admitted into the United States two years *before* the federal agreement that reserved the Indians' hunting rights. 420 U.S. at 200. This Court has recognized, however, that the question with regard to the equal footing doctrine is not whether a federal law relating to Indians was enacted before or after a State's admission, but rather whether that federal law violates the State's sovereignty. *Johnson* v. *Gearlds*, 234 U.S. 422, 439 (1914). In *Antoine*, the Supreme Court held that the federal agreement reserving Indian hunting rights did not violate Washington's sovereignty.

Supremacy Clause." *Id.* at 543; see generally *Missouri* v. *Holland*, 252 U.S. 416, 432-435 (1920) (holding that exercise of Article II treaty power as a basis for federal authority over wildlife does not offend 10th Amendment).

2. Petitioners next contend (Minn. Pet. 15-20; County Pet. 15-17) that the court of appeals' conclusion that the 1855 Treaty between the United States and certain Chippewa Bands, including respondent Mille Lacs Band, did not revoke those Bands' usufructuary rights under the 1837 Treaty conflicts with *Oregon Department of Fish & Wildlife* v. *Klamath Tribe*, 473 U.S. 753 (1985). As the court of appeals recognized (Pet. App. 39), however, this case does not involve a "situation * * * analogous" to *Klamath Tribe*.

The court of appeals began its analysis of petitioners' claims regarding the 1855 Treaty by examining, and affirming, the district court's factual findings, which were based on its "careful examination of the historical record established at trial." Pet. App. 35-38. The district court had determined that "(1) the government did not intend for the 1855 Treaty to extinguish the usufructuary rights reserved in the 1837 Treaty, (2) the Chippewa did not intend to give up their 1837 Treaty privilege and they did not understand the 1855 Treaty to have that effect, and (3) both the Band and the United States believed that the 1837 Treaty rights continued to exist after the 1855 Treaty was signed." *Id.* at 35-36 (citations omitted). In affirming those findings, the court of appeals noted "the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process," as well as "the lack of evidence that the

parties intended to extinguish these rights." *Id.* at 37.

Petitioners nonetheless contend that the 1855 Treaty must, as a matter of law, be construed as extinguishing the signatory Bands' usufructuary rights under the 1837 Treaty. They base that argument solely on the Bands' relinquishment in the 1855 Treaty of "any and all right, title and interest * * * which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere," other than the lands set aside for their reservation. Art. I, 10 Stat. 1166. According to petitioners, because the Court construed similar language in *Klamath* as abrogating the Indians' usufructuary rights, the same result must obtain here.

Klamath did not address the present question whether a treaty in which a Tribe generally conveys to the United States its "right, title and interest" in and to "any * * * lands"—other than the lands being set aside as its reservation—must be construed as implicitly extinguishing the usufructuary rights that the Tribe had expressly reserved by treaty on certain lands previously conveyed to the United States. The issue in *Klamath* was whether, when a Tribe ceded "all [its] claim, right, title and interest in and to" a particular piece of land, the Tribe implicitly reserved its right to hunt and fish on that land. 473 U.S. at 753. The Court's decision in *Klamath*, like the court of appeals' decision here, turned on the text and historical context of the particular agreements at issue. See 473 U.S. at 755 (noting that decision was based on "the terms of the 1901 Cession Agreement," "the predecessor 1864 Treaty," and "certain other events in the history of the Tribe"). The Court concluded that the Klamath Tribe's usufructuary rights, which

had been granted to them by the 1864 Treaty that created its reservation, were meant to exist only "within the limits of the reservation." *Id.* at 766. The Court reached that conclusion based on the treaty's provisions stating that (i) the Tribe's fishing rights extended only to "the streams and lakes included in said reservation," (ii) the Tribe's gathering rights extended only "within [the reservation's] limits," and (iii) the Tribe's rights were "exclusive," which would not "be possible on lands open to non-Indians." *Id.* at 767 (quoting Treaty of Oct. 14, 1864, 16 Stat. 708). Accordingly, when the Tribe ceded certain of its reservation lands to the United States in 1901, the Tribe no longer retained any rights to hunt and fish on those lands, because those rights "did not exist independently of the reservation itself." *Id.* at 768.

The Chippewa's usufructuary rights on the lands subject to the 1837 Treaty, in contrast, exist independently of the ownership status of those lands. The Chippewa ceded title to the lands in the 1837 Treaty, while expressly reserving the right to hunt, fish, and gather wild rice on the lands. Moreover, while the Klamath's usufructuary rights were exclusive, and thus could not exist on lands removed from the reservation, the Chippewa's usufructuary rights were not exclusive. It was understood that the Chippewa could not exclude others from the lands ceded by the 1837 Treaty. Nothing in *Klamath* required the court of appeals, in a case involving different agreements and different historical circumstances, to hold that the 1855 Treaty extinguished the Chippewa's rights under the 1837 Treaty. Indeed, *Klamath* recognizes (473 U.S. at 765-766 & nn. 16, 17) that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land," such as those

recognized to exist in *Antoine*, *supra*; *Winans*, *supra*; and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The State contends (Minn. Pet. 16) that the usufructuary rights here, like those in *Klamath*, were tied to land title, because the 1837 Treaty did not specify that the rights could be exercised "at all usual and accustomed places," as did the treaties in some of the Court's cases, and instead reserved the rights on all lands ceded by the 1837 Treaty. *Klamath* did not suggest, however, that usufructuary rights may be severed from land title only if they are to be exercised at "usual and accustomed places." To the contrary, *Klamath* cited *Antoine*, *supra*, and *Kennedy* v. *Becker*, 241 U.S. 556 (1916)—in each of which the Tribe retained hunting and fishing rights on lands ceded to the United States without reference to "usual and accustomed places"—as examples of rights that are independent of land ownership. See 473 U.S. at 765-766 & nn. 16, 17. The State's proposed distinction between the usufructuary rights here, which were reserved in a "geographic area," and rights reserved at "usual and accustomed places" thus has not been recognized by this Court or any court of appeals. And such a distinction would be an unlikely basis for a rule of law in any event, since the phrase "usual and accustomed places" describes "geographic areas."

Finally, petitioners' arguments based on the 1855 Treaty, if accepted by the Court, would have little practical effect even in this case, much less in any other case. Those arguments are directed at the usufructuary rights only of the Mille Lacs Band, and not

of the other respondent Chippewa Bands, which were not parties to the 1855 Treaty.

3. Petitioners also challenge the court of appeals' conclusion that the 1850 Executive Order, which purported to order the removal of the Chippewa from the lands ceded under the 1837 Treaty and to revoke their rights to hunt, fish, and gather wild rice on those lands, was invalid in its entirety. The court held that the removal provision was invalid because Congress, in the Act of May 28, 1830, ch. 148, 4 Stat. 411, had authorized such removal only with a Tribe's consent, which had not been secured from the Chippewa. The court further held, based on the historical record, that the removal provision was so "integral to the entire Order" that it could not be severed. Pet. App. 29.

a. The State does not dispute that President Taylor had no authority to issue the portion of the Executive Order directing the removal of the Chippewa from the ceded lands without their consent. Nor does the State dispute that the court of appeals applied the proper severability test, based on *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932), to determine whether the invalidity of one provision of the Executive Order (*i.e.*, the provision ordering the Chippewa's involuntary removal from the ceded lands) defeated the validity of the other provision (*i.e.*, the provision revoking the Chippewa's usufructuary rights). The State nonetheless seeks review of the court of appeals' application of that severability test to the particular Executive Order at issue here. But asserted errors involving "the misapplication of a properly stated rule of law" ordinarily do not warrant the Court's review. Sup. Ct. R. 10.

The State contends (Minn. Pet. 21-22) that the court of appeals should have held that the revocation provision was valid, independent of the removal provision, because the 1837 Treaty permitted the President "to terminate the Chippewa's hunting and fishing rights at his pleasure." The court of appeals rejected that argument, without reaching the question of the extent of the President's authority under the 1837 Treaty with regard to the Chippewa's usufructuary rights,[5] applying the severability test that the State concedes is the correct one. The court concluded (Pet. App. 28-29) that, although the Order contained two provisions that "seem separate," they could not be severed, because the historical record established that "[t]he purpose of the Order was to mandate removal, and this purpose was integral to the entire Order." The provision revoking the Indians' usufructuary rights was included merely "to encourage removal." *Id.* at 29. It is well-established that when "it is evident the legislature would not have enacted one [clause of a statute] without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the

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[5] Petitioners argue here, as they did below, that the 1837 Treaty gave the President unfettered discretion to revoke the Chippewa's usufructuary rights at any time and any reason. See Minn. Pet. 21-22; County Pet. 13-14; Thompson Pet. 17-18. As noted in the text, however, the court of appeals found it unnecessary to resolve that issue, given its ruling that the Order's revocation provision, whether or not it would have been valid standing alone, could not be severed from the invalid removal provision. There is no reason for this Court to grant certiorari to decide issues of treaty construction that the court of appeals did not reach.

invalidity of one clause." *Huntington* v. *Worthen*, 120 U.S. 97, 102 (1887).

b. The counties, although not the State or the landowners, contend (County Pet. 11-15) that the courts below were barred by the separation of powers doctrine from considering whether the 1850 Executive Order was valid. But this Court has recognized that courts may, in appropriate circumstances, assess the validity of Presidential action that is alleged to exceed the authority granted by Congress or the Constitution. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Cole* v. *Young*, 351 U.S. 536, 557-558 & n.20 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

The counties' argument is predicated, moreover, on a mischaracterization of this case an involving "a judicial challenge against a President who terminated treaty provisions" (County Pet. 12), such as that involved in *Goldwater* v. *Carter*, 444 U.S. 996 (1979) (granting petition, vacating judgment, and remanding for dismissal).[6] The respondent Bands brought this action to *confirm* their rights under the 1837 Treaty, not to terminate the Treaty or to invalidate the 1850 Executive Order. It was petitioners who asserted the Executive Order as a defense to the Bands' treaty claims. The counties cite no authority holding that the federal courts, in actions properly within their jurisdiction, cannot adjudicate the scope or validity of

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[6] No conflict exists between this case and *Goldwater* v. *Carter*, *supra*. That case, which involved a dispute between co-equal Branches of the federal government over the power to terminate a treaty, raised complex separation-of-powers and foreign policy issues that are absent here.

Executive Orders raised in support of, or in opposition to, a party's claim.

c. The district court also held (Pet. App. 319-321) that the 1850 Executive Order, even if valid, had been repealed by implication. The district court reasoned that the federal government not only did not enforce the Executive Order, but also took action inconsistent with it, such as by establishing reservations for the Bands on the very lands from which they were to have been removed under the Order. The court of appeals did not reach that (or any other) alternative ground given by the district court for holding that the 1850 Executive Order did not revoke the Bands' usufructuary rights. *Id.* at 31 n.25; see *id.* at 312-316 (addressing other grounds for decision). Accordingly, even if petitioners were to prevail on their challenge to the court of appeals' ruling on the validity of the revocation provision of the Executive Order, other grounds would remain available to the court on remand to conclude that the Bands' usufructuary rights survived the Executive Order.[7]

4. The landowner petitioners contend (Thompson Pet. 24-25) that the Bands are barred, by principles of res judicata and collateral estoppel, from asserting

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[7] The Eighth Circuit's ultimate conclusion on the Executive Order issue is consistent with that of the Seventh Circuit in *Lac Courte Oreilles*, 700 F.2d at 361-362, which held that the 1850 Executive Order was invalid because it exceeded the scope of, *inter alia*, the 1837 Treaty, which the Seventh Circuit construed as authorizing the revocation of the Chippewa's rights only if the Indians misbehaved. See also *State* v. *Gurnoe*, 192 N.W.2d 892, 900 (Wis. 1972) (concluding that 1850 Executive Order "was never effective," and thus did not extinguish Chippewa's fishing rights, because Chippewa continued to reside and exercise fishing rights on ceded lands).

their usufructuary rights claims because they could have asserted such claims in earlier proceedings in the Indian Claims Commission (ICC). The landowners' claims are without merit, present no conflict with the decisions of this Court or other courts of appeals, and involve no question of recurring significance.

The court of appeals did not address any res judicata issue, observing that "the State abandoned its res judicata defense" (Pet. App. 44 n.36), and apparently not perceiving the landowners to have preserved one. No viable res judicata defense could exist here in any event. The doctrine of res judicata, or claim preclusion, bars only those claims that could have been asserted in prior litigation between the same parties or their privies. *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979). None of the defendants in this case were parties, or in privity with parties, to the ICC proceedings.

Nor are the Bands' usufructuary rights claims barred by the doctrine of collateral estoppel, or issue preclusion, which applies only to "an issue of fact or law, actually litigated and resolved by a valid final judgment." *Baker* v. *General Motors Corp.*, 118 S. Ct. 657, 664 n.5 (1998). As the court of appeals recognized (Pet. App. 46-48), those claims were neither litigated nor resolved in the ICC proceedings.

The landowners also contend (Thompson Pet. 26-27) that the Bands' usufructuary rights were extinguished by the ICC award, which compensated the Bands for the lands ceded by the 1837 Treaty based on their "highest and most valuable uses." They contend that under *Klamath*, *supra*, the value of the Bands' usufructuary rights was necessarily subsumed within the ICC award—notwithstanding that

those rights were not put at issue in the ICC proceedings or mentioned in the ICC's lengthy opinion. The court of appeals properly rejected that argument based on the "crucial distinctions" between *Klamath* and this case. Pet. App. 50. As noted above, the Court was concerned in *Klamath* with the construction of the 1901 Agreement, which ceded to the United States "all [the Tribe's] claim, right, title and interest in and to" certain lands, without any mention of its usufructuary rights. The Court declined to read into the Agreement an implicit reservation of those rights. At the end of its opinion, the Court observed that an ICC award of additional compensation for those lands—which likewise contained no reference to usufructuary rights—"is entirely consistent with our interpretation of the 1901 Agreement." 473 U.S. at 774. The ICC's silence here is equally consistent with the court of appeals' construction of the 1837 Treaty as preserving the Chippewa's usufructuary rights. It cannot be supposed that the ICC would have "extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." Pet. App. 50.

The landowners further contend (Thompson Pet. 29) that the court of appeals' decision conflicts in this regard with decisions of the Ninth Circuit, which supposedly hold that "when Bands receive damages from the ICC for all inadequacies in the cession of Indian title, the Bands were paid for any hunting or fishing rights." But they cite no Ninth Circuit case that even states that purported rule, much less that

applies it in circumstances akin to those here.[8] To the contrary, the Ninth Circuit appears to agree that, where a Tribe has ceded title to certain lands while reserving the right to use those lands for certain purposes, an ICC award of additional compensation for those lands does not automatically extinguish the Tribe's reserved rights. See, *e.g.*, *Swim* v. *Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (where Tribes ceded lands to United States while reserving grazing rights on those lands, and Tribe later sought additional compensation for those lands in ICC, court declined to construe general language of ICC settlement as encompassing Tribe's grazing rights).

5. The counties present a final question (County Pet. i) as to "[w]hether a federal court may decline to apply this Court's 'moderate living' doctrine," citing *Fishing Vessel*, *supra*. As the court of appeals explained (Pet. App. 67), however, this Court imposed

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[8] The landowners cite *United States* v. *Dann*, 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989), and *United States* v. *Pend Oreille County P.U.D. No. 1*, 926 F.2d 1502, 1508 (9th Cir.), cert. denied, 502 U.S. 956 (1991), neither of which addressed treaty-reserved usufructuary rights. The landowners' two remaining cases involve usufructuary rights but do not state the rule asserted. In *Western Shoshone National Council* v. *Molini*, 951 F.2d 200, 202-203 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992), the court held that an ICC award constituted compensation for all rights under the treaty at issue, because no treaty had granted the rights claimed. The court specifically distinguished the 1837 Treaty at issue here, which explicitly reserved hunting, fishing, and gathering rights. *Id.* at 203 (citing *Lac Courte Oreilles Band*, 700 F.2d at 355-358). Finally, in *Wahkiakum Band* v. *Bateman*, 655 F.2d 176 (9th Cir. 1981), an unratified treaty was found not to have protected the asserted aboriginal fishing rights, which were held extinguished by a 1912 statute. No ICC proceedings were at issue.

restrictions on the Tribes' treaty-based fishing rights in *Fishing Vessel* only after concluding that a "resource [*i.e.*, fish] has now become scarce." 443 U.S. at 669. In contrast, the court of appeals determined (Pet. App. 65), as a matter of fact, that "no danger of depletion of resources" exists here, because those resources are adequately protected under the Conservation Code and Management Plan entered into between the State and the Chippewa. The court of appeals therefore determined that no need existed, as in *Fishing Vessel*, for a judicial allocation of resources between Indian and non-Indian users. Accordingly, because this case does not arise in the same context of "scarce natural resources" (443 U.S. at 685) as did *Fishing Vessel*, the two cases do not conflict. Nor have the counties demonstrated any other legal error in this aspect of the court of appeals' decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, *et al.*,

Petitioners,

-and-

COUNTY OF AITKIN, *et al.*,

Petitioners,

-and-

JOHN W. THOMPSON, *et al.*,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS, MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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This brief opposes Petitions for Certiorari filed by the State of Minnesota (No. 97-1337) and certain Minnesota Counties (No. 97-1356) and Landowners (No. 97-1357). Respondents include two Minnesota Chippewa Bands (Mille Lacs and Fond du Lac) and six Wisconsin Chippewa Bands (Bad River, Lac Courte Oreilles, Lac du Flambeau, Mole Lake, Red Cliff and St. Croix), who were parties to the Treaty of July 29, 1837 (App. 484-89). The United States is also a respondent and is filing a separate opposition brief.

STATEMENT OF THE CASE

A. Background.

In the 1837 Treaty the Chippewa ceded land to the United States in present-day Wisconsin and Minnesota. App. 484. The United States promised, however, that the Chippewa could continue to hunt, fish and gather on the ceded lands. This promise is expressly stated in Article 5 of the Treaty (App. 486), which provides:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

As we show below, these rights remain in force to this day.

In 1983, in a case involving the Wisconsin part of the cession, the Seventh Circuit held that the rights secured by Article 5 continue to exist, and this Court denied certiorari. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983). On remand, the Western District of Wisconsin defined the nature and scope of the rights, as well as the scope of state authority to regulate their exercise. *See* App. 22 n.19 (subsequent history of *Lac Courte Oreilles*). The Court entered final judgment in 1991,

Lac Courte Oreilles Band v. Wisconsin, 775 F. Supp. 321 (W.D. Wis. 1991), and no party appealed.

The Chippewa have exercised their Article 5 rights in Wisconsin since the mid-1980s under the *Lac Courte Oreilles* decisions. The United States, the Bands and the State of Wisconsin have worked cooperatively to ensure effective harvest regulation and natural resource protection. For its part, the United States has *inter alia* provided annual appropriations to help fund tribal programs involving "off-reservation fish, wildlife, and gathering resources to which Indian treaty rights were reaffirmed in *Lac Courte Oreilles* and related cases,"[1] and promulgated annual Federal wildlife regulations that accommodate off-reservation hunting rights under the 1837 Treaty.[2]

B. District Court Proceedings.

The Mille Lacs Band commenced this case and the United States intervened to prevent Minnesota officials from interfering with the Band's exercise of its 1837 Treaty rights in the smaller, Minnesota portion of the 1837 cession.[3] Following *Lac Courte Oreilles*, the District Court held that the rights guaranteed in Article 5 continue to exist. App. 350. Also consistent with *Lac Courte Oreilles*, it held the rights can be exercised only on public

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1. *E.g.*, U.S. Dept. of the Interior Budget Justifications, F.Y. 1998 at pp. BIA 111-12; F.Y. 1997 at pp. BIA 99-100; F.Y. 1996 at pp. BIA 113-14. Notably, the appropriations are directed toward implementing the Chippewa's rights in the Minnesota as well as the Wisconsin part of the 1837 ceded territory. *Id.*

2. *See, e.g.*, 62 Fed. Reg. 46420, 46422-23 (Sept. 2, 1997); 61 Fed. Reg. 46352, 46355 (Aug. 30, 1996); 57 Fed. Reg. 35446, 35450 (Aug. 7, 1992). The regulations likewise cover the Minnesota as well as the Wisconsin part of the ceded territory. *Id.*

3. Approximately 25 percent of the 1837 ceded territory is in Minnesota. *See* note 4 below.

lands[4] and those private lands that are open to public hunting and fishing by operation of state law. App. 337-38.[5] Applying well-established law, including *Lac Courte Oreilles*,[6] the District Court held the State can regulate the exercise of the treaty right, but only to the extent necessary for conservation of the resources, public health or public safety. App. 344-45. The Wisconsin Bands intervened, and the Court applied these holdings to them, App. 210, and, in a separate case, to the Fond du Lac Band. App. 478.

Following the District Court's "Phase I" decision, the Bands prepared a conservation code and management plans to regulate harvest activities by their members in the Minnesota ceded territory. In good faith negotiations with the State defendants,[7] the Bands

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4. Out of approximately 3 million land acres in the Minnesota ceded territory, there are less than 440,000 acres of public lands on which Band members might be able to exercise their rights. Supp. Aff. of J. H. Gilbert at 3 (9-11-96). These figures should be contrasted with the Counties' (Pet. 3) and Landowners' (Pet. 21 n.28) erroneous figures of 13 million and 6.5 million acres, respectively.

5. The District Court later held that only private lands enrolled in Minnesota's tree growth tax program satisfy this requirement. App. 104-12. There are few, if any, such lands in the Minnesota ceded territory. Supp. Gilbert Aff. at 3-4.

6. *E.g. Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 & n.25 (1979); *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 & 401 n.14 (1968); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1238-42 (W.D. Wis. 1987).

7. Contrary to the Counties' (Pet. 28) and Landowners' (Pet. 23 n.31) claims, no order compelled the State defendants to negotiate.

agreed to make many changes in these documents and coordinate harvest management and resource assessment with the State. The State defendants agreed that, in light of the revised Band code, management plans and protocols, there was no conservation, public health or safety need to apply most State conservation laws to Band members. App. 79-82.

The District Court denied defendants' request to further restrict Band harvests, because no showing was made that Band harvests would interfere with the rights of non-Band members. App. 138. It preserved defendants' right to seek an allocation of resources upon a proper showing in the future. App. 152, 163.

C. The Eighth Circuit's Decision.

The State defendants, Counties and Landowners appealed, alleging that the Bands' rights were extinguished or their claims otherwise barred on multiple grounds. *See* App. 16-70. The Bands cross-appealed, challenging the District Court's limitation of the lands on which they could exercise their rights. App. 70-72. The Eighth Circuit affirmed in all respects. App. 72.

The State (Pet. i) presents three questions here: whether the Bands' 1837 Treaty rights were extinguished by either: (1) an 1850 Executive Order; (2) an 1855 Treaty; or (3) the 1858 Minnesota Admission Act. We limit our description of the Eighth Circuit's opinion to these issues.[8]

1. The 1850 Executive Order. The 1850 Order purported to revoke the Chippewa's hunting, fishing and gathering rights and to order them to remove from the ceded territory. App. 21. Applying *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),

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8. Other aspects of the opinion are either not embraced within any of the Petitions or are raised only by the Counties and Landowners. We address the additional questions they present in Section IV below.

and its progeny,[9] the Eighth Circuit held that the President had no authority unilaterally to order the removal of Indian people, and in purporting to do so violated the requirement in the 1830 Removal Act that the Indians consent to removal. App. 23-26. The Court noted that the "defendants do not cite to any evidence indicating that the President was authorized to remove the Bands without their consent." App. 25. Because it was "clear . . . that the Bands in this litigation did not give consent for removal," the Court concluded that "President Taylor had no authority for his 1850 Executive Order of removal." App. 26-27.

The Court then considered whether "the portion of the Order extinguishing the 1837 usufructuary rights is separate and severable from the portion of the Order requiring removal." App. 27. Using the test articulated in *Champlin Ref. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932), and applied in *New York v. United States*, 505 U.S. 144, 186 (1992), and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), App. 27-28, the Court held that the revocation portion of the Order cannot be severed from the directive to remove. App. 29. It noted that the purpose of the Order was to mandate removal, this purpose was integral to the entire Order, all of the historical evidence surrounding the Order related to removal, and there is no evidence that revocation of usufructuary rights would have been made independently of the removal mandate.

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9. *See Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject' ") (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)); *Cole v. Young*, 351 U.S. 536, 557 & n.20 (1956) (when the President rests his action on statutory authority, "the validity of the action must be determined solely by the congressional limitations which the President sought to respect"). *See also United States v. Santa Fe Pacific RR Co.*, 314 U.S. 339, 355-56 (1941) (forcible removal of Walapais Indians to a reservation was "not pursuant to any mandate of Congress" and therefore "unauthorized" and of no legal effect).

App. 29-31.[10] Accordingly, it held the entire 1850 Order invalid. App. 31.[11]

2. The 1855 Treaty. The Court also rejected the argument that the 1837 usufructuary rights were terminated by the Treaty of February 22, 1855 (App. 502-14). Of the eight Bands in this case, only the Mille Lacs Band, but not the Fond du Lac or the six Wisconsin Bands, was a party to the 1855 Treaty. The 1855 signatory Bands ceded additional lands in north-central Minnesota and relinquished "all right, title, and interest" to any other lands. App. 502-03; *see* App. 35.

The Eighth Circuit analyzed the 1855 Treaty "in its historical context to determine whether the parties meant it to revoke usufructuary rights." App. 36. It considered both the understanding

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10. The District Court found that "the only reason that the 1850 executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa to benefit the Minnesota economy." App. 310. It also found that an order of revocation without removal would have been inimical to the purposes of the Order "because it would have halted useful trade in furs and other natural resources by the Chippewa without other benefit in return." *Id.* And, it considered and rejected the Landowners' argument (Pet. 7-8, 18-19) that the President would have revoked the Chippewa's usufructuary rights to clear land titles. App. 311-12.

11. The District Court held that the Order had no present effect on the Chippewa's treaty rights on several alternative grounds as well. It held that even if the Order could be severed, the President did not have unfettered discretion to revoke the Chippewa's rights under the treaty given the statutory duty of good faith imposed by the Northwest Ordinance, the Government's trust responsibility to Indian tribes, its explicit promises of just treatment during the treaty negotiations, and the Chippewa's understanding that their rights would be protected by the President. App. 313-15. The District Court (like the Seventh Circuit in *Lac Courte Oreilles*) held that the Order violated these duties, App. 315-16, and, in any event, was repealed by subsequent orders and treaties. App. 319-21. The Eighth Circuit did not consider these alternative grounds for decision. App. 31, n.25.

of the Indians[12] and the Government, and found that neither "intended or understood the treaty to work such a revocation." App. 36-37. It held that, "[g]iven the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process, and the lack of evidence that the parties intended to extinguish these rights," the 1855 Treaty did not revoke the Mille Lacs Band's usufructuary rights under the 1837 Treaty. App. 37-38. In so ruling, the Court carefully considered and distinguished *Oregon Dept of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). App. 38-39.

3. Equal Footing. The Court also rejected the argument that the 1837 rights were repealed by implication upon Minnesota's admission to the Union. It followed the analytical framework in *Crow Tribe v. Repsis*, 73 F.2d 982 (10th Cir. 1995), *cert. denied*, 116 U.S. 1851 (1996), App. 52-55, but found that the Bands' rights in this case were not "temporary and precarious" in the sense those terms were used in *Repsis*, and therefore survived statehood. App. 55. Applying settled law, the Court also found that the Bands' rights here "are not irreconcilable with the State's sovereignty," App. 56-58, and noted that "defendants have presented no evidence surrounding the legislation admitting Minnesota into the Union from which we could conclude that Congress intended to abrogate the 1837 Treaty rights." App. 59.

REASONS FOR DENYING THE WRIT

The decision below confirms the continued existence of the Chippewa's rights to hunt, fish and gather pursuant to the 1837 Treaty in the smaller, Minnesota portion of the 1837 ceded territory. These are the same rights confirmed by the Seventh Circuit fifteen years ago in the Wisconsin portion of the ceded territory. This Court declined to review the Seventh Circuit's decision then, and

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12. *See Passenger Fishing Vessel*, 443 U.S. at 676 ("treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").

review is even less appropriate today. The issues have been settled with finality in Wisconsin for years, and the rights have been responsibly exercised by the Chippewa and actively supported by the United States. Moreover, the Eighth Circuit's decision does not conflict with decisions of other Circuit Courts or this Court and, because it is based on unique historical facts concerning the 1837 Treaty, 1850 Order and 1855 Treaty, does not present issues of general applicability. More specifically:

1. The controversy over the 1850 Order involves a single executive order with no significance outside this case and *Lac Courte Oreilles*. Both Circuits held the 1850 Order ineffective, as did the Wisconsin Supreme Court in 1972.[13] In reaching that result here, the Eighth Circuit correctly stated and applied the controlling law. Petitioners do not challenge the Eighth Circuit's conclusion that the President lacked authority to order removal and do not challenge the severability test it employed. Indeed, the only aspect of its holding regarding the 1850 Order that is challenged here is its *application* of the severability test. This narrow, fact-based challenge does not warrant certiorari.

2. The 1855 Treaty affects, at most, only one of the eight Bands. The Eighth Circuit applied well-established principles of treaty interpretation in holding that the 1855 Treaty did not revoke the Mille Lacs Band's hunting and fishing rights under the 1837 Treaty. Its decision discusses and distinguishes *Klamath*, where this Court held that hunting and fishing rights that were clearly tied to reservation lands were ceded when those reservation lands were ceded. In this case, the Chippewa's rights were expressly severed from the land when the land was ceded in 1837. The 1855 Treaty, which was intended to extinguish Indian land claims, did not affect these separate, treaty-secured hunting and fishing rights.

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13. *State v. Gurnoe*, 53 Wis. 2d 390, 405-07, 192 N.W. 2d 892, 899-900 (1972).

3. Nor is there any conflict among the Circuits regarding the equal footing doctrine and treaty secured usufructuary rights. The Eighth Circuit utilized the analytical framework set forth by the Tenth Circuit in *Repsis*, and correctly concluded that the treaty right at issue here was intended to survive statehood. Its ruling falls squarely within this Court's precedents, which confirm that treaty rights, even those subject to a power of revocation, are *not* impliedly repealed by statehood under the equal footing doctrine.

I. THE 1850 EXECUTIVE ORDER

A. The Eighth Circuit's Decision Does Not Conflict with This Court's Decisions.

Petitioners argue that the Eighth Circuit's holding that the 1850 Order was invalid conflicts with this Court's precedents concerning treaty interpretation and review of Executive Orders. *E.g.* St. Pet. 20-23; Co. Pet. 11-15; Ld. Pet. 14-15, 17-20. However, Petitioners do not confront the Eighth Circuit's analysis, which shows that the President had no authority to order the Chippewa to remove, and that the Order's removal and revocation clauses could not be severed. Petitioners fail to show that this analysis conflicts with any ruling of this Court, or that there was any error in the predicate findings on which it was based.

Significantly, Petitioners do not challenge the Eighth Circuit's holdings that the President had no authority to order removal unilaterally, and that Indian consent to removal was required by Congress in the 1830 Removal Act. App. 24-25. Further, Petitioners do not challenge the Eighth Circuit's holding that the Chippewa did not consent to remove in this case, identifying no treaty provision which provides such consent. And, Petitioners do not challenge the Court's conclusion that, because there was no authority for the directive to remove, it was unlawful.[14]

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14. To the extent the Counties argue that even Presidential orders that lack authority and conflict with Congressional directives must be (Cont'd)

This leaves only the Eighth Circuit's determination that the Order cannot be severed. Only the State addresses severability, and it agrees (Pet. 23) that the Eighth Circuit "appropriately cite[d] the test for severing an executive order." It argues only that the Court improperly applied this test. Pet. 23-24. While no such error was made,[15] the "misapplication of a properly stated rule of law" is in any event rarely grounds for a writ of certiorari. Sup. Ct. R. 10. The Court should not make an exception in this case. The 1850 Order has no continuing significance outside the issues presented here and in the *Lac Courte Oreilles* litigation. The Seventh and Eighth Circuits (the only Circuits with jurisdiction over the lands ceded in 1837) agree that the Order did not revoke the Chippewa's usufructuary rights. In the absence of any conflict between the Circuits, there is no need for this Court to review the application

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(Cont'd)

enforced by the Courts (Pet. 11-15), their argument is clearly foreclosed by *Youngstown*. App. 23, n.20; *see also Santa Fe*, 314 U.S. at 355-56. Notably, the Counties make no attempt to apply either their analysis or the cases they cite to the Eighth Circuit's holding regarding removal. For example, in *Dalton v. Spector*, 511 U.S. 462, 476 (1994), the Court interpreted an Act of Congress to confer unfettered discretion on the President to approve or disapprove a base closing recommendation. The Eighth Circuit found no such authority for removal in this case, and the Counties cite none.

15. The State's argument on the merits disregards the District Court's findings regarding the purpose of the Order and the Eighth Circuit's discussion of them. *See* note 10 and accompanying text above. Instead, it argues that, on its face, the Order had two objectives — revocation of usufructuary rights and removal. But the State cites no evidence of an intent to revoke the Chippewa's hunting and fishing rights absent removal. Notably, the Territorial Resolution it cites was entitled "a joint resolution related to the *removal* of the Chippewa Indians from the ceded lands within the Territory of Minnesota," and did not seek revocation of usufructuary rights absent removal. App. 566-67 (emphasis added).

of correctly stated principles of severability to the singular, 150-year old facts of this case.

B. The Issue Petitioners Raise Was Not Decided by the Eighth Circuit.

The issue pressed most strenuously by Petitioners — the scope of the President's authority under Article 5 of the 1837 Treaty — was not addressed by the Eighth Circuit. *See* App. 31 n.25 (declining to address standard for presidential action). Petitioners argue that Article 5 should be read to confer unfettered discretion on the President to revoke the Chippewa's rights at any time and for any reason. St. Pet. 21-22; Co. Pet. 13-14; Ld. Pet. 17-18. The District Court disagreed, holding on multiple grounds that the President did not have unfettered discretion, *see* App. 312-15 and note 11 above, but the Eighth Circuit's decision "obviates any need to consider" this issue. App. 31 n.25.[16] There can be no conflict between the Eighth Circuit's decision and Supreme Court precedent with respect to an issue not decided by the Circuit. Furthermore, certiorari is not appropriate to decide an issue the Circuit Court did not reach, especially where, as here, the grounds on which it did rely are dispositive and largely unchallenged.

C. The Questions Presented Do Not Warrant Review in Light of the District Court's Alternative Holding that the Order Was Repealed.

Although the Eighth Circuit did not reach the issue, the District Court also held that the 1850 Order was repealed. App. 319-21.

16. The State's assertion (Pet. 22) that the Eighth Circuit essentially read the phrase "during the pleasure of the President" out of the Treaty is wrong; the Court did not need to and therefore did not address the meaning of that phrase. Likewise, the Landowners' claim (Pet. 18) that the Court "dismissed the idea that the President could revoke the privilege without ordering removal" mischaracterizes the Court's decision; it did not address this "idea" because President Taylor did *not* revoke the privilege without ordering removal.

The Wisconsin Supreme Court reached the same conclusion in upholding Chippewa fishing rights in 1972.[17]

The District Court's conclusion was based on a careful analysis of a detailed historical record, the material parts of which were relied upon by the Eighth Circuit as well. App. 30, n.24. Minnesota officials sought the Order for economic reasons, to bring Chippewa from Wisconsin to Minnesota, so that the new Territory would benefit from sizable annuity payments and Indian agency operations. App. 251-53, 267. When removal efforts caused hundreds of Chippewa deaths from starvation and disease, App. 256-59, the United States suspended removal operations and did not reinstate them. App. 259-64; *see also* App. 30, n.24. Instead, it allowed the Chippewa to remain on ceded land, App. 264-66, gave them equipment to hunt and trap there, *id.*, and established reservations for them there in 1854 and 1855 treaties. App. 266-67, 274, 283. In 1855 government officials recognized the Bands' continued rights to hunt and fish on ceded lands under the 1837 Treaty. App. 269-71; *see also* App. 30, n.24.

There is no record of any reference to the 1850 Order for more than 70 years thereafter. App. 300.[18] Although the Order was invoked by federal officials in the 1930s to assert that the Chippewa's usufructuary rights had been revoked, there is no evidence that these officers considered the historical circumstances or made any determination regarding the validity or repeal of the

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17. *Gurnoe*, 53 Wis. 2d at 405-07, 192 N.W. 2d at 899-900.

18. This Court issued three opinions indicating that no removal order had been issued. *United States v. J.S. Stearns Lumber Co.*, 245 U.S. 436, 437 (1918); *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 582 (1894). In 1897 the United States Attorney argued that the Chippewa retained rights to hunt and fish under the 1837 Treaty, and the Minnesota Attorney General agreed. App. 326-27 & n.21. In 1925 the Bureau of Indian Affairs stated that there was "[n]o record" that the usufructuary rights reserved in the 1837 Treaty had been abrogated. App. 327.

Order. App. 300.[19] When the Executive Branch did so, it asserted repeatedly that the Order had no effect on the Chippewa's pre-existing rights.[20] The United States' position in this case is only the latest manifestation of what is now clear Federal policy that the Chippewa's 1837 rights remain in force. *See, e.g.*, notes 1 & 2 and accompanying text above.

The District Court held that the 1850 Order was repealed because the provisions of the 1854 and 1855 treaties were "completely contrary to the 1850 order" and "the executive branch intended to repeal" the order. App. 320-21 (citing, *e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976)). Given the District Court's and the Wisconsin Supreme Court's holding that the Order was repealed, the detailed factual findings supporting that holding, and clear Federal policy affirming the Chippewa's rights, Petitioners' arguments regarding the validity of the Order before its repeal do not justify review by this Court.

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19. The Counties (Pet. 19-21) and Landowners (Pet. 10-11, 20) also cite statements from the late 19th and early 20th centuries that the State could regulate Chippewa hunting and fishing. However, the extent of State authority to regulate treaty hunting and fishing rights was an open question until this Court's 1942 decision in *Tulee v. Washington*, 315 U.S. at 684-85. These pre-*Tulee* assertions of state regulatory authority thus have no bearing on the existence of the right. *See also* App. 297-98.

20. The United States advanced this position in 1954 in Court of Claims litigation involving Chippewa occupancy rights, App. 386, in 1983 in the *Lac Courte Oreilles* litigation, *see* United States' Motion to Dismiss and Affirm at 7, 12-13, *Besadny v. Lac Courte Oreilles Band*, 464 U.S. 805 (1983) (No. 83-6), and in this case.

II. THE 1855 TREATY

A. Factual Background.

The Government negotiated treaties with the Fond du Lac and Wisconsin Bands in September 1854 and the Mille Lacs and other Minnesota Bands in February 1855. App. 31-32, 34-35. "The evidence is overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights," App. 34, and no party challenges that holding here.

Article 1 of the 1855 Treaty cedes a ten million acre tract north and northwest of the 1837 cession. App. 35. It also states: "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." App. 35.[21] The 1855 Treaty does not mention usufructuary rights, and the rights guaranteed in the 1837 Treaty were not mentioned in the treaty negotiations. App. 35. However, contemporaneous with those negotiations, government officials, including the Minnesota Territorial Governor and *ex officio* Superintendent of Indian Affairs, acknowledged the continued existence of the Bands' usufructuary rights under the 1837 Treaty. *See* App. 269-71.

During the 1855 Treaty negotiations, Chippewa representatives expressed their understanding that the Government's purpose was

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21. The District Court found that the Government included this provision in the 1855 treaty to extinguish land claims of certain signatory Bands in northern Minnesota that were not included in the ten million acre tract. App. 286-88. The Government used broad language because it was not certain about the nature and scope of these land claims. App. 288. The District Court also found that the most likely Chippewa translation of this provision would have indicated that the Chippewa were transferring their remaining lands to the United States, but would not have conveyed any sense that they were relinquishing their hunting, fishing and gathering privilege under the 1837 Treaty. App. 284, 324-25.

to purchase land, and that the Chippewa would continue to hunt, fish and gather after the Treaty was concluded. App. 36. The United States drafted treaty provisions revoking usufructuary rights in other cases, but did not do so here. App. 36-37. The authorizing act for the 1855 Treaty showed that the United States was concerned about the extinguishment of land title, not usufructuary rights. App. 37.[22]

B. Because Only One of the Eight Bands in This Case Was a Party to the 1855 Treaty, the Question Whether the 1855 Treaty Revoked That Band's Usufructuary Rights Does Not Fundamentally Affect the Outcome of The Case.

Of the eight Bands in this case, only the Mille Lacs Band was a party to the 1855 Treaty. The Fond du Lac Band and the six Wisconsin Bands were instead parties to the 1854 Treaty. None of the Petitions before this Court seeks review of the Eighth Circuit's holding (App. 31-34) that the 1854 Treaty preserved the Bands' 1837 treaty rights. Thus, even if the Court were to determine that the 1855 Treaty revoked the rights of the Mille Lacs Band, the other seven Bands would retain their usufructuary rights in the Minnesota ceded territory. Since such a determination would not fundamentally alter the outcome of the case, certiorari is inappropriate.

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22. The District Court found that the retention of hunting and fishing rights was consistent with Federal policy, and that the terms of the Treaty and the negotiations indicate that both parties expected the Chippewa to continue to hunt and fish on ceded lands. App. 289-90. Had the Government sought to terminate 1837 usufructuary rights, it would have done so in the *1854* Treaty, when most of the Bands holding those rights were present, but it did not. App. 288-89. *See also Johnson v. Gearlds*, 234 U.S. 422, 438 (1914) (provision in the 1855 Treaty barring the sale of liquor on ceded lands "evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, *would be at liberty to roam and to hunt throughout the entire country, as before*") (emphasis added).

C. The Eighth Circuit's Decision Is Consistent with *Klamath*.

The Eighth Circuit applied the principles of treaty interpretation articulated in *Klamath*, but found that the rights at issue here were materially different than those at issue in *Klamath* and were not terminated by the 1855 Treaty. It explained:

> The 1864 Treaty rights in *Klamath* were exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation. The rights at issue in this litigation are *non-exclusive* and *off-reservation* rights, reserved in a treaty not mentioned in the 1855 Treaty or its negotiations. The situations are not analogous and do not compel the same outcome.

App. 39. This conclusion is sound and does not warrant certiorari.

In *Klamath* an 1864 treaty created a reservation and secured "the *exclusive* right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." 473 U.S. at 755 (emphasis added). The treaty did not provide for off-reservation rights. *Id.* at 755. Due to a surveying error, a large tract was excluded from the reservation. *Id.* at 755-56. In 1901, the Tribe ceded "all [its] claim, right, title and interest in and to" the excluded land. *Id.* at 760.

This Court conducted a "[c]areful examination of the entire record" to determine the intent of the parties. *Id.* at 774. The most important factor was that the 1864 treaty rights were "plainly . . . intended to be exercised within the limits of the reservation." *Id.* at 766-68. Because the rights were tied to reservation land, they were terminated when reservation land was ceded. *Id.* at 769-70. The Court distinguished treaties and agreements under which Indians "enjoy special hunting and fishing rights that are independent of

any ownership of land." *Id.* at 765-66 & n.17. Cases interpreting such rights shed no light on the case before it, which involved the "precedent question whether *any* off-reservation rights were intended to be reserved at all." *Id.* at 769, n.20 (emphasis added).

Petitioners read *Klamath* to hold treaty language ceding "all claim, right, title, and interest in and to" land extinguishes hunting and fishing rights as a matter of law. St. Pet. 20; Co. Pet. 17; Ld. Pet. 20-21. However, the Court did not construe the language in the abstract; it held the treaty had to be interpreted "in the entirety of its particular historical context," and its language given a "fair appraisal" based on "the entire record." 473 U.S. at 773 n.23 & 774.[23] The most important factor in *Klamath* — that the rights were tied to and could not exist independently of the reservation — is not present here, where a privilege of hunting and fishing was guaranteed on *ceded* lands in 1837. Indeed, the *Klamath* Court recognized that treaty rights such as those at issue in this case are "independent of any ownership of land" and are distinguishable from those at issue in *Klamath*. It did not hold that such "independent" treaty rights are extinguished as a matter of law by language ceding interests in land.

As required by *Klamath*, the Eighth Circuit analyzed the 1855 Treaty "in its historical context to determine whether the parties meant it to revoke usufructuary rights." App. 36. Although the Court's application of the *Klamath* test to the fundamentally

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23. *Cf. South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 799 (1998) (rejecting "literal construction" of savings clause in favor of "sensible construction" that avoids an "absurd conclusion" and gives effect to intentions of parties). In this case, the lower courts' interpretation avoided the "absurd conclusion" that the 1855 Treaty revoked the Mille Lacs Band's hunting and fishing rights when, only five months earlier, the 1854 Treaty preserved the same rights for the Fond du Lac and Wisconsin Bands. Instead, the lower courts' "sensible construction" gave the cession provision precisely the effect the Government intended it to have. *See* App. 327-28; note 21 above.

different rights and very different historical context in this case led to a different result, that does not establish a conflict with *Klamath*.[24]

The treaty history here is unique: a treaty explicitly reserving a hunting and fishing right on one tract of ceded land was followed by another treaty ceding a different tract of land and releasing all other land claims. Petitioners identify no similar situation involving any other Tribe, and such facts are unlikely to arise in another case. Certiorari to review the Eighth Circuit's application of well-established principles of law to these case-specific circumstances is inappropriate.

III. THE EQUAL FOOTING DOCTRINE

Citing *Repsis*, the State asserts (Pet. 10-11) there is a conflict between the Eighth and Tenth Circuits over whether treaty rights that are "temporary" in nature are extinguished under the equal footing doctrine. There is no such conflict. First, the Eighth Circuit here and Tenth Circuit in *Repsis* undertook the same analysis, determining the nature of the right first, and then considering whether the right had survived statehood. *Cf.* App. 55-58 *with Repsis*, 73 F.3d at 988. That a different result was reached by the Eighth Circuit, under a different treaty, with a different historical context, does not create a conflict between the Circuits. Second, the State's contention that Article 5 of the 1837 Treaty was extinguished by the equal footing doctrine is foreclosed by no less than four decisions of this Court, which establish that even a treaty right that is subject to later revocation by the United States is not invalidated by the equal footing doctrine.

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24. The Counties (Pet. 16) and Landowners (Pet. 20) also allege a conflict with *Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980). Although an intra-circuit conflict is not an appropriate basis for certiorari, we note that there is no such conflict. *Red Lake* affirmed the decision in *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn 1979), which, like *Klamath*, involved rights that were "mere incidents of Indian title, not rights separate from Indian title." *Id.* at 1385.

A. There Is No Conflict Among the Circuits.

The treaty provision at issue in *Repsis,* set forth in Article 4 of the 1868 Crow Treaty, was identical to that contained in Article 4 of the 1868 Shoshoni-Bannock Treaty, which was before the Court in *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Ward*, the Court held that the right embraced only "unoccupied" lands of the United States, and only until the United States transferred title to such lands. 163 U.S. at 509-10. Such a right, the Court held, was "temporary and precarious" and therefore not intended to survive statehood. *Id.* at 510-16. The *Repsis* court, construing identical treaty language, adopted *Ward's* interpretation of that language. Both *Ward*, 163 U.S. at 515, and *Repsis*, 73 F.3d at 991, recognized that a right that was "continuing" in nature would *not* be impliedly repealed under the equal footing doctrine.

The Eighth Circuit recognized and applied this distinction. App. 53-55. However, considering the District Court's comprehensive historical analysis, the Eighth Circuit distinguished the rights at issue in *Ward* and *Repsis* from the rights reserved in Article 5 of the 1837 Chippewa Treaty. App. 55 (citing App. 188, 453-54). The latter are *not* limited to "unoccupied" lands and are *not* dependent on the United States retaining title to particular parcels of land, *id.*, but were intended to "guarantee[ ] the Bands the right to continue their way of life through hunting, fishing and gathering." App. 150. Accordingly, they are not temporary and precarious within the meaning of *Repsis*, "but instead were intended to be continuing rights." App. 55.[25]

25. The State asserts (Pet. 12) that the Eighth Circuit "deviated from the framework established in *Ward* and *Repsis* by asserting that the equal footing doctrine only applies to rights which are tied to ownership of the land." This is a misreading of the Eighth Circuit's opinion, which recognized the distinction between "temporary and precarious" rights and "continuing" rights. The Court simply noted that it was the dependency of the rights at issue in *Ward* and *Repsis* on the lands remaining both "unoccupied" *and* in the ownership of the United States that established their "temporary and precarious" nature.

The State argues (Pet. 13-14) that because Article 5 permits the President to revoke the right, it is not "continuing" in nature. However, as the Eighth Circuit held, "the fact that the rights could be revoked by the President, or abrogated by Congress like any other treaty right, does not deprive them of their 'continuing' nature." App. 55-56 n.42. Thus, under *Repsis*, there is no basis for finding they do not survive statehood.

B. Supreme Court Decisions Confirm that the Eighth Circuit's Decision Was Correct.

The correctness of the Eighth Circuit's holding is firmly established by this Court's decisions, which hold that a treaty right, even one which the United States reserves the power to later revoke, is *not* invalidated by the equal footing doctrine. For example, in *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 193 (1876), the Court held that the Constitution authorized a post-statehood treaty extending the federal liquor laws to ceded lands "until otherwise directed by Congress or the President of the United States." The Court rejected the claim that this provision violated the equal footing doctrine, holding that it was authorized by the Federal Government's power to treat with Indian tribes. *Id.* at 197.[26] In *Johnson v. Gearlds*, 234 U.S. 422 (1914), a *pre-statehood* treaty was challenged on the same grounds. The Court unanimously reversed the District Court's holding that Article 7 of the 1855 Treaty, which barred the introduction of liquor into lands that had been ceded by the Treaty "until otherwise provided by Congress," was repealed by the Minnesota enabling and admitting acts. The Court held:

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26. The Court subsequently held that the Federal Government has the power to reserve hunting and fishing rights in *pre-statehood* Indian treaties, and that such rights are not repealed upon the admission of a state into the Union. *United States v. Winans*, 198 U.S. 371, 382 (1905). The Court has reconciled such rights with State regulatory authority in a long series of cases. *See* App. 56-58; *see also* note 6 above.

> [I]f the making of such a treaty after the admission of the state is not inconsistent with the "equal footing" of that state with the others, — as, of course, it is not, — it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

Id. at 439. The power of the United States to enact the treaty provision, the Court confirmed, was "thoroughly established." *Id.* at 438-39.[27]

These cases confirm that rights such as those at issue here are not impliedly repealed under the equal footing doctrine, and that the Eighth Circuit correctly distinguished such rights from those at issue in *Ward* and *Repsis*. In any event, the Eighth Circuit's analysis gives full credence to *Repsis* and presents no conflict warranting certiorari.

IV. ISSUES NOT RAISED BY THE STATE[28]

A. Indian Claims Commission.

The Landowners allege (Pet. 24-30) that there is a conflict among the Circuits over the question whether an Indian Claims Commission (ICC) award for the value of ceded land extinguishes hunting and fishing rights. The Eighth Circuit's careful analysis

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27. The Court reached the same result in two Wisconsin cases involving Chippewa occupancy rights under Article 2 of an 1842 Treaty, which were also subject to a power of revocation. *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 584 (1894).

28. As noted above, only the Counties or Landowners raise these issues.

of this issue (App. 48-51) shows there is no such conflict.[29] The Court held that where a treaty explicitly reserves usufructuary rights on ceded land — such as the 1837 Treaty here — ICC silence with regard to those rights when awarding compensation for the ceded land " 'implies no determination as to those rights.' " App. 50.[30] In contrast, where a treaty is silent regarding usufructuary rights on ceded lands — such as the 1901 Agreement at issue in *Klamath* — silence by the ICC regarding those rights coupled with a payment for the land implies that the rights were " 'disposed of by the cession of the land.' " App. 50.

Other federal courts have recognized this distinction and have held that an ICC award for the value of ceded land does not bar claims based on usufructuary rights that were expressly reserved when the land was ceded.[31] There is no conflict.[32]

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29. The Landowners' description (Pet. 26-27) of the proceedings before the ICC intermixes statements made in superseded petitions in one case involving only some of the Bands with statements made in wholly different cases, including one brought under a different jurisdictional act. For an accurate description of the proceedings, *see* App. 39-48.

30. The ICC did not have jurisdiction to extinguish tribal rights, but only to award compensation for property acquired or rights terminated by the United States. *E.g. United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir.), *cert. denied*, 493 U.S. 890 (1989).

31. *E.g. United States v. Washington*, 135 F.3d 618, 637 (9th Cir. 1998) (reaffirming *United States v. Washington*, 459 F. Supp. 1020, 1039-42 (W.D. Wash. 1978)); *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), *cert. denied*, 506 U.S. 822 (1992) (distinguishing the Chippewa's 1837 Treaty as discussed in *Lac Courte Oreilles* from the Shoshone Treaty, which did not expressly reserve usufructuary rights); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983); *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013, 1014 (9th Cir. 1967).

32. Apart from *Molini* (*see* note 31 above), the cases cited by the Landowners (Pet. 29 n.42 & 43) do not involve usufructuary rights.

B. Standard of Review.

The Counties assert (Pet. 23-25) that there is a conflict concerning the standard of review, citing Ninth and Tenth Circuit cases. The Ninth Circuit reviews treaties and executive orders *de novo*, but reviews findings of historical fact for clear error.[33] The Eighth Circuit did the same here. App. 27, 37-38.[34] The Tenth Circuit case cited by the Counties is distinguishable and does not establish a conflict.[35]

C. State Regulatory Authority.

As discussed above (*see* note 6 and accompanying text), the District Court applied the "conservation necessity" standard developed by this Court to determine the permissible extent of State regulatory authority. The Eighth Circuit agreed that this was the proper standard. App. 57-58 n.43. The Landowners present three questions concerning this standard (Pet. i-ii, #3-5). First, they ask "[w]hether by virtue of the Nelson Act . . . and the General Allotment Act . . . the Chippewa were subject to state regulation for all off-reservation hunting and fishing activities." Pet. i, #3. However, they cite no provision of either Act that purports to affect such off-reservation rights, and cite no case holding that either Act affects such rights. Pet. 21.

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33. *See United States v. Washington*, 135 F.3d at 629-30; *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334, 342-43 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1432 (1997); *United States v. Aam*, 887 F.2d 190, 194 (9th Cir. 1989).

34. In many instances, the Eighth Circuit's independent review of the record amounted to a *de novo* examination of factual issues as well. *See* App. 26-27 ("[i]t is clear to us that the Bands . . . did not consent"), 36-37 (reviewing historical facts concerning 1855 Treaty).

35. The Court reviewed a mixed question of law and fact *de novo* because it "primarily involve[d] the consideration of legal principles." *Pittsburgh & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1393-94 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

Second, the Landowners ask whether any immunity from State regulation conflicts with *Klamath*, Pet. i, #4, contending there is a distinction between a treaty "right" and a treaty "privilege". Pet. 15-16. *Klamath* does not support this distinction; the Court used the terms interchangeably in discussing the "conservation necessity" standard. *E.g.* 473 U.S. at 765 n.16, 768. Other courts have expressly rejected the distinction. *E.g. State v. Miller*, 102 Wn.2d 678, 683, 689 P.2d 81, 84 (1984).

Third, the Landowners ask whether any limitation on State regulation violates the Tenth Amendment. Pet. i-ii, #5. However, as noted above (note 26), this Court has squarely held that the Federal Government had the power to guarantee hunting and fishing rights in Indian treaties, and used the "conservation necessity" standard to reconcile such rights with State sovereignty. Where the Federal Government has power to take action, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992).

D. Allocation.

The Counties (Pet. i #3) ask "[w]hether a federal court may decline to apply this Court's 'moderate living' doctrine . . . and order a maximum of one-half the hunting and fishing be dedicated to Indian Bands' harvest . . ." However, there is no court order allocating 50 percent of the resources to the Bands. *See* App. 60-61. The Bands' own management plans restrict Band harvests "well below" 50 percent of the available harvest. App. 130. The Eighth Circuit held that there was no present need for a further, judicial allocation because there was "no danger of depletion of resources," App. 65, nor any showing by defendants that their right to any resource has been harmed. App. 66. The Counties (Pet. 28-29) do not discuss these rulings and make no attempt to show that they conflict with any precedent of this or any other Court. Certiorari is not appropriate to review a decision that denied a request for an allocation "without prejudice." App. 163.

CONCLUSION

The Petitions for Certiorari should be denied.

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No. 97-1337, 97-1356 and 97-1357

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

COUNTY OF AITKEN, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

JOHN W. THOMPSON, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

COUNTIES' REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondents' Removal Act Arguments Fail to Recognize the President's Constitutional and Statutory Authority.

The Respondents build a straw man arguing that the Removal Act of 1830 (4 Stat. 411) did not provide the President authority to revoke the treaty privilege.

The argument overlooks the constitutional and other statutory sources of the President's power here, including the Treaty to which the Chippewa had consented. This is especially important since numerous other treaty provisions and executive orders of this era are implemented through this broader Presidential power.

Laurence H. Tribe in his *American Constitutional Law* (2d ed. 1988) analyzes Article II, the Executive power, which includes inherent and "implied" power, in addition to authority delegated by Congress. (Tribe, *supra*, § 4-2 at 211). Though Professor Tribe discusses foreign affairs, Article II provides the President power in the area of Indian affairs which is analogous, especially during the historical period in question.[1]

There are two constitutional bases. Major policy was implemented through the President's shared article II "power, by and with the consent of the Senate, to make treaties . . . " U.S. Const. art. II, § 2. The President is also made "commander-in-chief of the army . . . of the United States" by Article II § 2. Indian affairs were administered

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[1] Until Congress barred treaty-making with Indian tribes in 1871, Act of March 3, 1871, 16 Stat. 566.

through the Army in this historical period. Thus, President acted in a dual role, both explicitly authorized by the Constitution, to negotiate and to administer treaties.

A constitutionally shared power may be delegated to the President "more broadly than it could where its (Congress' delegated) power as enumerated in Article I defines the totality of federal authority." (Tribe, p. 212, *citing United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). Congress did explicitly so delegate broad power over Indians, e.g., 2 U.S.C. § 2, § 9; the latter of which, first enacted in the 1830s, provides:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

2 U.S.C. § 9.

The President had power to totally extinguish the Indians' claims to the land. The President also had the lesser-included power to allow any hunting or fishing privileges and provide that such could be conditioned or limited in duration.

Any question of presidential authority here is finally resolved by the fact that Congress ratified the Treaty of 1837, including the explicit "at the pleasure of the President of the United States" limitation on the privilege.

Both Respondents repeat the claim that the Chippewa consent was not obtained. However, the Chippewa signed the 1837 Treaty (and accepted benefits) after explanation that their use of the ceded lands would be terminable – "temporary" as the President of the United States called it, when revoking. (*See* Treaty Minutes,

quoted below at p. 7.) Later treaties of 1854 and 1855 provided reservations for permanent homes and the Indians consented to relocating to these reservations.

2. These "Privileges" Admittedly Did Not Continue on Private Lands; They are Temporary Like the Rights in *Repsis* and *Race Horse*.

A key weakness in Respondents' argument is the admission these treaty privileges have long lapsed at least as to private lands. Trying to minimize the importance of this case, the Chippewa Respondents' brief claims that acreage figures for the 1837 Treaty area overstate the *affected* lands since only a fraction of the land is open for treaty use; "public lands and those private lands that are open to public hunting and fishing by operation of state law." (Chippewa Resp. Br., p. 3 and n. 4). Respondents then provide a lowered acreage estimate of public lands, in an effort to minimize the impact of this judgment.

This reflects the Circuit rejection of the Bands' cross-appeal which had sought to extend the privilege to more (most) private lands. App. 70-71. More importantly, this shows that the treaty privilege no longer extends to *all* lands. When lands became private, the treaty right of access terminated. As to such lands, the privilege was temporary.

The conservation impact on natural resources is worsened, however, since the resources allocated include *all* resources from *all* lands and waters in the Minnesota treaty area. Indeed fish production from boundary waters, such as Mille Lacs Lake, outside the ceded area was even included in the allocation. (*Mille Lacs Band of*

Chippewa Indians v. Minnesota, 952 F. Supp. 1362 (D. Minn. 1997); App. 103-104.)

The Chippewa Respondents argue that the Eighth Circuit distinguished the rights at issue in *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 116 U.S. 1851 (1996), and *Ward v. Race Horse*, 163 U.S. 504 (1896), from those in the 1837 Chippewa Treaty because "the latter are *not* limited to 'unoccupied' lands and *not* dependent on the United States retaining title . . . [and thus] temporary and precarious . . . but instead were intended to be continuing rights." Chippewa Resp. Br. at p. 19.

The United States Respondent, more succinctly, argues: "The court of appeals applied Race Horse's continuing/temporary distinction." (U.S. Resp. Br., p. 12.) The United States paraphrases the conclusion "the Chippewa's treaty rights (sic) . . . were intended by the parties to be continuing rights." (U.S. Resp. Br., p. 12.) As to private lands, this is just wrong.

The circuit court rejected the Bands' cross-appeal and concluded that the privilege has terminated as to private land; there was no access right for treaty hunting, fishing or ricing to such lands. App. 70-71. This holding is unchallenged, as there was no cross-petition.

This conclusion there is no right on private land contrasts remarkably with the one decision of this Court on which both Respondents rely, *United States v. Winans*, 195 U.S. 371 (1905), cited U.S. Resp. Br. at pp. 10, 13, 14, Chippewa Resp. Br. at 20. That *Winans* case expressly held there *was* a continuing access right over private lands.

Ironically, the exception under the decision below is that a *state* law opening private lands to hunting and fishing apparently may renew the privilege as to such lands.

As to the majority of lands in Minnesota which were ceded in 1837 (nearly 85% by the Chippewa Respondent calculation), the privilege was temporary and does not extend to those lands.

The contrary conclusion that the privilege was permanent or "continuing" as to public lands disregards not only the express revocation but the conclusion and characterization of the U.S. President. In the 1850 order – President Taylor expressly referred to the privilege as "temporary" while revoking it: "The privileges granted *temporarily* to the Chippewa . . . are hereby revoked." App. 253, emphasis added. This Court recently held a Presidential proclamation to reveal the contemporaneous understanding:

> This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive. . . . " *Rosebud*, 430 U.S. at 602-603.

South Dakota v. Yankton Sioux Tribe, 66 U.S.L.W. 4092, 4099 (1998). The language of the 1850 Order is surely persuasive as a nearly contemporaneous pronouncement by the President. In *Hagen v. Utah*, 510 U.S. 399, 420 (1994), an Order of President Roosevelt was "clear evidence of the understanding at the time."

The contradictory suggestion by both Respondents that the Indians understood the privilege to be permanent is also flatly contradicted by the express rejection of

Indian negotiators' proposal to lease the land to the United States and retain long-term use. As reflected in the 1837 Treaty Journal, *e.g.*, the U.S. negotiators responded: "Your Great Father never buys land for a term of years" but "it will probably be many years . . . Before your great father will want all these lands for the use of his white children." 1837 Treaty Journal 149.

3. The Eighth Circuit Conflicts with the Tenth Circuit which Had Faithfully Implemented this Court's Decisions.

While claiming this decision may be reconciled with the Tenth Circuit's *Repsis* and this Court's *Race Horse* on which that Circuit relied, the United States includes a lengthy footnote questioning "the continued vitality of *Race Horse's* rationale," (U.S. Resp. Br., p. 13, n. 3) and suggest this Court's decision has been "modified by implication" or "entirely discredited." To the contrary, this Court has cited to the *Race Horse* decision over 20 times, including recently.[2]

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[2] *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 773 n. 23 (1985); *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 179 (1980) (Rehnquist concurrence and dissent), *reh'g denied*, 448 U.S. 911 (1980); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 682 n. 25 (1979); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412, n. 12 (1968); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Tulee v. Washington*, 315 U.S. 681, 683, n. 2 (1942); *Board of County Comm'n v. United States*, 308 U.S. 343, 354 n. 5 (1939) (Black concurrence); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63. 70 n. 6 (1928); *LaCoste v. Department of Conservation*, 263 U.S. 545,

As the Tenth Circuit noted:

> [W]e view *Race Horse* as compelling, well-reasoned, and persuasive. Also, contrary to the Tribe's views, there is nothing to indicate that *Race Horse* has been "overruled, repudiated or disclaimed." *Race Horse* is alive and well.

Repsis, 73 F.3d at 994. The U.S. Respondent's argument to the contrary actually reflects the Eighth Circuit Court's refusal to apply this Court's ruling and conflicts with the Tenth Circuit.

4. The Eighth Circuit Court Approved Resource Allocation While Refusing to Apply This Court's Moderate Living Standard.

Both Respondents would mislead this Court into believing there is no allocation of resources here (U.S. Resp. Br. at 26: "no need existed, as in *Fishing Vessel* [*Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979)], for a judicial allocation." Chippewa Brief at 24: "There is no court order allocating 50 percent of the resources to Bands." However, the Eighth Circuit admitted an allocation has occurred:

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549 (1923); *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 83 (1922); *Ruddy v. Rossi*, 248 U.S. 104, 109 (1918) (Holmes dissent); *John Bund Brewing Co. v. Great N. Ry. Co.*, 246 U.S. 651 at 651 (1917); *Virginia v. West Virginia*, 246 U.S. 565, 593 (1917); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562 (1915); *McCabe v. Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 159-60 (1914); *Ex Parte Webb*, 225 U.S. 663, 683, 690 (1911); *Coyle v. Smith*, 221 U.S. 559, 573 and 576 (1910); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Bollin v. Nebraska*, 176 U.S. 83, 88 (1900).

> The Conservation Code and Management Plan they have drawn up *is in effect an allocation of resources between treaty and nontreaty harvesters*. It is understandable that the Counties and Landowners, neither of which was a party to the stipulation agreeing to the Code and plan, dispute *the de facto* allocation made therein.

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997), App. 65, emphasis added.

The district court even more also expressly acknowledged the allocations approved in the Plan:

> The Bands have further agreed that their quotas [of big game] will not exceed 50% of the harvestable surplus in any permit unit . . .
>
> . . .
>
> . . . [as to fish] the treaty harvest is subject to a 50% ceiling . . . [but the] Management Plan . . . set the Band's quotas well below 50%.[3]

952 F. Supp. at 1381-88, App. 116, 137.

Note the allocations are "phased in" and annually increase. Also, the allocations deal with resource production from the *entire* 1837 ceded area, though the Band hunting is allowed – and concentrated – only on the much smaller portion of public and some private lands.

Conservation of these natural resources may only be assured by restriction of other citizens hunting and fishing in an amount at least equal to the harvest of the Bands. Since the Bands have become relatively wealthy

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[3] This appears in the section of the opinion approving Bands killing deer by "shining" over bait at night.

from casino gambling, the "moderate living" doctrine should be considered before such draconian results.

The result, as the circuit court admitted is at least "de facto" allocation (approved by court order), which may be converted to *de jure* under continuing jurisdiction whenever the State resists Bands' demands.

5. This Case is An Attack on the President's Authority.

The U.S. Respondents object that "The Counties' argument is predicated on a mischaracterization of this case as involving a judicial challenge against a President" and "The Counties cite no authority holding that federal courts . . . cannot adjudicate the scope or validity of Executive orders. . . . " (U.S. Resp. Br., p. 21.)

Dalton v. Specter, 511 U.S. 462 (1994), is the most recent such case (cited in Counties' Petition, pp. 13-15). Like this case, *Dalton* was ostensibly against other defendants but ultimately sought to invalidate a *Presidential* decision:

> In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

511 U.S. at 471.

The court below necessarily curiously "transmuted" this case into one considering the reviewability of the Presidential Order of 1850, ultimately holding President Taylor's Order "unlawful." In *Dalton*, this Court succinctly answered:

> But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

Dalton, 511 U.S. at 474.

* * *

The Petition for Writ of Certiorari should be granted.

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No. 97-1337, 97-1356, and 97-1357

In the
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MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, LANDOWNERS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves to file the attached brief amicus curiae.[1] Consent to file this brief has been granted orally by counsel for the United States, the State of Minnesota, the landowners, the Minnesota Counties, and the Mille Lacs Band of Indians. The letters of consent received have been lodged with the Clerk of this Court. Requests for consent to file the amicus curiae brief were made to the other parties, but as of the date of filing this brief, no responses have been received.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation has participated in numerous cases before the United States Supreme Court involving the protection of private property rights. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to name but a few.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amicus seeks to augment the argument in the parties' briefs by arguing that if there are any remaining Chippewa usufructuary rights, the federal government has taken them and the only appropriate remedy for the taking is just compensation. No injunction should issue where such a remedy at law exists, specifically where the equities between the parties weigh heavily in favor of innocent private landowners. In particular, PLF is concerned that the Eighth Circuit's decision ignores the serious harm an injunction will work on innocent property owners.

For the foregoing reasons, PLF requests this Court to grant its motion to file the attached amicus curiae brief.

DATED: August, 1998.

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, Pacific Legal Foundation (Amicus), is set forth in the preceding motion.

OPINION BELOW

The Eighth Circuit opinion below is *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, and is set forth at 124 F.3d 904 (8th Cir. 1997).

INTRODUCTION

In this case, the Mille Lacs Band of Chippewa Indians (Band) has won an injunction from the district court and Eighth Circuit that prohibits the State of Minnesota from enforcing its hunting and fishing regulations against the Band. The court granted the injunction based on an 1837 Treaty which gave the Band a temporary right to hunt and fish on lands the Band had ceded to the federal government. Even though the injunction technically applies only to the State of Minnesota, it significantly interferes with the rights and reasonable expectations of third parties, especially private landowners. The lower courts did not take this impact into account. Had they done so, the lower court would have recognized that the appropriate remedy to enforce any remaining usufructuary rights is compensation for the Chippewa Indians and not injunctive relief.

For more than 150 years, the private landowners in the Mille Lacs area and their successors have put their lands to use based on their reasonable belief that the Mille Lacs Band of Chippewa Indians' claims of hunting, fishing, and gathering

rights no longer existed. These rights, temporarily granted under an 1837 Treaty, were terminated in 1850 by an Executive Order of the President of the United States. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d at 914. The United States government promoted this belief when it asserted over and over again that the 1837 Treaty rights had been terminated. Despite the United States government now recanting its position, its past actions created and promoted the wide-held understanding that the Indians no longer had unique hunting, fishing, and gathering rights. The government held the land open for the public to settle, transferred land it represented as having clear title, and encouraged settlers to invest their sweat and income to make the land productive and valuable.

Not until 1990 did the Band belatedly bring this action to enforce their dormant hunting and fishing rights under the 1837 Treaty. The Band argues that its treaty rights never actually terminated, and contrary to years of expressing a contrary position, the United States sided with the Band in complete disregard for the impact its position had on the private landowners. As presented more fully below, the Band, the United States, and now the lower courts have placed all the burden of resurrected treaty rights on the innocent landowners. This is inappropriate under the facts of this case.

STATEMENT OF THE CASE

In 1837, the United States government and representatives of 12 bands of Chippewa Indians negotiated a treaty which ceded Indian ownership of certain lands in the Upper Midwest to the United States in exchange for money, goods, and supplies. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d at 909-10. The treaty granted the Band the temporary privilege of hunting, fishing, and

gathering[1] in the ceded territory "during the pleasure of the President of the United States." 124 F.3d at 910.

In 1850, President Zachary Taylor issued an Executive Order which revoked the temporary privileges allowed in the 1837 Treaty. 124 F.3d at 914. Nothing more was said until five years later, when the United States signed a new treaty with the Chippewa.

This 1855 treaty gave to the Chippewa certain reservation land and provided that the Chippewa

> fully and entirely relinquish and convey to the United States, any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the Territory of Minnesota.

Mille Lacs Band of Chippewa Indians v. State of Minnesota, 861 F. Supp. 784, 815 (D. Minn.1994).

The 1855 Treaty was a confirmation of President Taylor's 1850 order revoking the Chippewa hunting, fishing, and gathering rights to further the United States government's policy to promote settlement of Minnesota and the West. Act of Congress, March 3, 1837; State Appellate Appendix to the Eighth Circuit Court of Appeals at 312. To further this policy, the government issued land patents conveying clear title to settlers reserving no Chippewa usufructuary rights. *See, e.g.*, patent issued to landowner's predecessor in interest, John Colson, Landowner's Trial Exhibit 13, A. Vol. 10 at 2911.

Development and use of the lands ceded under the 1837 and 1855 Treaties have gone forward ever since the President's 1850 Executive Order. *See* Landowner's Appendix to the Eighth Circuit at 10955. Much of that development relied on

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[1] This brief will collectively refer to these rights as "usufructuary rights."

the fish and game resources on the ceded lands which fostered the investment and construction of many hunting lodges in the Mille Lacs area. These businesses have long been important recreational resources for the general public. In fact, annual tourism spending directly related to hunting and fishing in the ceded area is estimated at $34,620,000. Landowner's Appendix to the Eighth Circuit at 10948.

After approximately a 100-year dormancy, the issue of what remained of the Chippewa's "usufructuary" rights surfaced in a 1960 adjudication of rights before the Indian Claims Commission. A purpose of the Indian Claims Commission was to give Indians compensation if their property had been taken without just compensation. 60 Stat. 1049 § 2. The Act also gave the Commission authority to consider all equitable claims an Indian tribe or band may have against the United States. *Id.* Yet any remedy was limited to compensation. *Id.* The Chippewa filed a claim with the Indian Claims Commission which awarded the tribe $9,000,000 more than originally received for the ceded lands. The award was calculated to pay them for the highest and best use of the land. 124 F.3d at 924.

Nevertheless, 140 years after President Taylor revoked their usufructuary rights, the Band and some of its individual members filed this action against the State of Minnesota seeking to enjoin the State from enforcing its hunting and fishing regulations against Band members on lands they had ceded to the State under the 1837 Treaty. Several Minnesota counties and landowners intervened in the action to protect their rights.

The United States district court granted the requested relief and enjoined the State of Minnesota from enforcing its hunting and fishing regulations against members of the Chippewa tribe on ceded public lands and on private lands that their owners had kept open to the public. The Eighth Circuit

affirmed the district court and this Court granted the State of Minnesota's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The State of Minnesota, the counties, and the landowners argue that the 1850 Executive Order, the subsequent 1855 Treaty, the Act admitting Minnesota to the Union as a State,[2] and the Indian Claims Commission award of $9,000,000 terminated the Chippewa usufructuary rights on ceded lands. Amicus, however, will not repeat the parties' arguments. Instead, Amicus will demonstrate that injunctive relief is not an appropriate remedy to vindicate Chippewa treaty rights.

Three principles of equity dictate against injunctive relief in this case. First, injunctive relief should not issue when an adequate remedy at law is available. Even if the Band's treaty rights were not completely terminated by the 1850 Executive Order, the 1855 Treaty, the Minnesota Statehood Act, and the Indian Claims Commission award, the federal government, nevertheless, has taken them. The Band has an adequate remedy in the form of compensation from the United States government for any taking of its usufructuary rights. This Court and Congress have approved of this remedy in other cases where the United States government improperly

[2] Minnesota, like all states, was admitted to the United States "on equal footing with the original states in all respects,"and there was no reservation or exception made for the usufructuary rights temporarily allowed to the Chippewa. 124 F.3d at 926. Since those rights existed only during the pleasure of the President, they were "temporary and precarious" and terminated upon the admission of Minnesota to the Union. *Ward v. Race Horse*, 163 U.S. 504, 507 (1896).

abrogated an Indian treaty right and enforcement of the improperly abrogated treaty right would adversely affect the rights of third parties.

Second, before a court issues injunctive relief, equity requires the court to consider the harm to the parties. Consideration of the harms in this case should preclude the issuance of an injunction. Stopping the State from enforcing its fishing and hunting regulations will seriously harm the economic and business interests of the innocent landowners.

Finally, laches precludes relief where a party delays bringing an action to enforce a right and the delay prejudices others. This doctrine applies here because the Band delayed bringing this action for 140 years even though it knew about Minnesota's interpretation of its rights under the 1837 Treaty and knew that Minnesota enforced state hunting and fishing laws inconsistent with Band usufructuary rights. The Band's delay has severely prejudiced landowners who have developed and invested in their property under the belief that the Band would not be asserting any residual treaty claims.

ARGUMENT

I

INJUNCTIVE RELIEF IS IMPROPER BECAUSE THE BAND HAS AN ADEQUATE REMEDY AT LAW

It is a fundamental principle of long standing that a request for an injunction will not be granted as long as an adequate remedy at law is available.

National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 n.22 (1985). Thus, a court should not grant injunctive relief for the Band if an adequate legal remedy exists.

A. If the Mille Lacs Band's Usufructuary Rights Survived the 1850 Executive Order and the 1855 Treaty, Then the Wrong the Band Seeks to Remedy by This Action Is the United States Government's Taking of Those Rights

The record in this case shows that the United States government issued land patents that purported to convey unreserved title in ceded Mille Lacs Band lands to many landowners. In making these conveyances, the United States did not reserve any aboriginal rights. For example, the land patent given to one of the current landowner's predecessors in title provided:

> TO HAVE AND HOLD the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said John Colson and his heirs and assigns, forever.

Landowner's Trial Exhibit 13, A. Vol. 10 at 2911. Such land patents issued without reservation of any rights are inconsistent with the continuation of any Mille Lacs Band usufructuary rights. When the United States government issued these land patents, it transferred the fee simple estate, which is the highest estate in land. Cornelius J. Moynihan, *Introduction to the Law of Real Property*, 33-35 (1979). The fee simple estate authorized the lands' permanent, exclusive, physical occupation by their new owners which made it impossible for the Band to possess any longer, much less, enjoy its usufructuary rights. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176

(1979) (the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property).

The United States' issuance of patents without reservation of any Band amounts to the government authorizing the physical occupation of private property (Band's usufructuary rights) which constitutes a taking:

> [A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms that rule, recent cases do not question it, and the purpose of the Takings Clause compels its retention.

Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 426 (1982).

The government's action in this case is also similar to the action taken in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). There, by enactment of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.*, Congress prohibited a mining company from exercising its right to mine a particular coal deposit, because the coal was located in an alluvial valley floor Congress deemed necessary to protect. In essence, Congress appropriated the coal for its own purposes which the Court found to be a taking.

This case is no different conceptionally. By conveying unrestricted ownership of the ceded land to settlers along with the right to exclude all others, including Band members, from gaining access to the land to hunt and fish, the government appropriated the Band's usufructuary property rights for what it considered a more important purpose. It packaged these rights with all other rights embodied in fee ownership as an

incentive for settlers to move into Minnesota. Such an appropriation is a taking.

B. The Band Has a Legal Remedy for the Taking It Claims to Have Suffered: Compensation

Compensation, not injunctive relief, is the remedy for a taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).[3] This remedy has been successfully sought a number of times by tribes. *See Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); and *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 299 U.S. 476 (1937). Compensation is the appropriate remedy here as well.

The mechanism for seeking compensation is readily available. The Band can seek compensation and money damages from the United States in federal claims court under 28 U.S.C. § 1505,[4] which provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any *tribe, band*, or *other identifiable group of American Indians* residing within the

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[3] The record shows that a monetary value can be placed on the 1837 Treaty right to hunt, fish, and gather on ceded Chippewa land. Landowner's Appendix to the Eighth Circuit at 10955. Thus, there is no difficulty in arriving at a dollar figure to compensate the Band.

[4] Individual Native Americans deprived of treaty rights can sue in federal district court or the claims court under the Tucker Act. *See* 28 U.S.C. § 1346(a)(2) (federal district jurisdiction for claims under $10,000).

> territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

(Emphasis added.)

See, e.g., Hurley v. Kincaid, 285 U.S. 95, 104 (1932) (holding that if government action "does constitute … a taking, the complainant can recover just compensation under the Tucker Act in an action at law" (citation omitted)).

C. Compensation Is Not Only an Available Legal Remedy, It Is the Proper Remedy

This case, of course, does not represent the first time a branch of the United States government has been called upon to balance Indian treaty rights against landowner rights. On most occasions where the rights are in conflict, both the judiciary and legislative branches have endorsed a compensation remedy.

1. This Court Has Approved a Compensation Remedy Rather Than Injunctive Relief to Enforce an Indian Treaty Right

A tribe's right to take fish and game is a compensable property right under the Fifth Amendment. *Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W.D. Mich. 1995). To protect this property right, this Court has approved just compensation as a remedy where United States government conduct has frustrated Indian treaty rights. For

example, in *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, the Sioux Tribe sought monetary damages for the government's taking of a rock quarry and transferring it to private parties. This Court upheld the lower court's award of monetary relief to the Sioux Tribe. *Id.* at 359. With regard to its decision on the remedy, the *Yankton* Court expressed its concerns for the plight of innocent landowners:

> It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers.

Id. at 357. The Court concluded that, since the Tribes were entitled to a judgment in their favor but a return of the lands to the Tribes was impossible, the Tribes were "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359.

As in *Yankton*, courts regularly tailor remedies to the problems at hand. Monetary relief representing fair value is "just compensation" and constitutionally is the equivalent of tangible or real property. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. 131.68 Acres of Land*, 695 F.2d 872 (5th Cir.), *cert. denied*, 464 U.S. 817 (1983) ("the government must, and need do no more than, put the owner in 'as good a position pecuniarily as if his property had not been taken.'" *Id.* at 875 (quoting *Olson v. United States*, 292 U.S. at 255)).

In another case, *United States v. State of Minnesota*, 270 U.S. 181 (1926), the United States sought cancellation of land patents given to the State of Minnesota. The lands subject to the patents should have been reserved for the Chippewa.

This Court ruled in favor of the government and the Chippewa. It ordered the patents canceled "unless the state has sold the lands, and in that event [the United States] is entitled to recover their value." 270 U.S. at 206. While this Court did not specifically address why lands sold to others were not canceled, prejudice to third parties and the availability of an alternative compensation remedy undoubtedly provided the basis.

Such judicial tailoring of an appropriate compensation remedy also took place in *United States v. Sioux Nation of Indians*, 448 U.S. 371, where the Supreme Court addressed tribal claims that the Tribe was entitled to the return of land sold by treaty. Under the Fort Laramie Treaty of 1868, the United States had originally promised that the Sioux reservation, including the Black Hills (and basically all of South Dakota west of the Missouri River), would be set aside for the absolute and undisturbed use and occupation of the Sioux. *Id* at 375-76. The treaty also provided that no cession of land would occur without three-fourths approval of the adult male Sioux. *Id.* at 376. After the discovery of gold in the Black Hills, the United States wanted to trade the Sioux the Black Hills for subsistence rations. Although only 10% of the adult male Sioux approved the new treaty, Congress enacted the agreement anyway, thereby abrogating the Fort Laramie Treaty. *Id.* at 381-83. The Court held that, because the government had acquired the land dishonestly and unfairly, the amount paid for the Black Hills had to be construed as an abrogation of the original treaty. The action of Congress in abrogating the treaty

> effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation,

> and that obligation, including an award of interest, must now, at last, be paid.

United States v. Sioux Nation, 448 U.S. at 424.

Once the abrogation was established, the United States was required to pay the Indians just compensation for the taking of the Black Hills. *Id.* at 423-24. The Indians could not reclaim the Black Hills—even though the United States acted in bad faith—because the land had already been settled and was put to other uses. Under these circumstances it was impossible, unreasonable, and impractical to award the Black Hills back to the Sioux. *Id.* at 377-78. *See also Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (United States government ordered to pay Shoshone compensation for illegally moving Arapaho onto Shoshone lands).[5]

In the case at bar, many of the affected landowners innocently acquired their property which had, as a critical component of its value, the availability of fish and game. Some invested in lodges and resorts where guests came to hunt and fish, reasonably expecting that the State of Minnesota would regulate the taking of fish and game to ensure an adequate supply for future generations. Other property owners opened their land for public hunting with the same expectations and in reliance upon the United States government's representation over 150 years that no Chippewa usufructuary rights remained.

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[5] Lower courts have declined to issue injunctions where innocent landowners are injured. For example, *United States v. Imperial Irrigation District*, 799 F. Supp. 1052, 1069 (S.D. Cal. 1992) (district court refused to enforce an injunction against private property owners because "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent farmers who are blameless in this lawsuit and who have worked hard to cultivate desert lands"; monetary relief awarded).

Should this Court decide these rights were never acquired by the treaty, it has, nevertheless, become impractical and unreasonable to recognize them now as they have been taken by the government's authorization of private party occupation. Rather than disrupting the status quo by enjoining the State from enforcing its needed regulations and concomitantly injuring private landowners, this Court should instead direct the Band to refile its claim in the Court of Federal Claims where it can seek an award of monetary damages from the federal government. *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 12-14 (1990).

2. Congress Has Recognized That a Compensation Remedy Is More Appropriate to Enforce Indian Treaty Rights Than Injunctive Relief

Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), is very similar to the case at bar. This Court addressed the question of whether a tribe, which had ceded territory to the United States under a valid agreement, still retained a special right to hunt and fish on the lands free of state regulation. Even though the Court found that the tribe did not retain any special rights, *id.* at 763-64, it proceeded to address the appropriateness of the remedy Congress provided for a survey error that had improperly excluded certain land from the Klamath reservation. *Id.* at 756-57. This Court reasoned that the federal purchase of the improperly excluded Indian land was necessary to settle conflicts between the Indians and rapidly increasing numbers of settlers who had moved into disputed reservation lands. Rather than restore the lands excluded, due to the survey error, to the tribe—an option which would have left intact the tribe's exclusive right to hunt and fish on those lands—Congress chose

to remove the excluded lands from the reservation entirely, leaving them open for all citizens' use and to compensate the tribe for a taking. *Id.* at 771-72.

Such reasoning was earlier embodied in statute when Congress adopted the Indian Claims Commission Act. Act of 1946, Chapter 959, 60 Stat. 1049 (1946). The Act created an Indian Claims Commission to "hear and determine ... claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians." Section 2. The Act provided relief for:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; ... (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant.

60 Stat. 1049 § 2.

Significantly, although the Act allowed equitable claims, it provided only for monetary relief. *See* 60 Stat. 1049 § 2 (providing for the method of determination of the amount of relief). Congress had a reason to limit the relief to payment of compensation: the unfair impact on innocent landowners of making them pay for past wrongs of the United States government. As the District Court of the District of Columbia

noted in applying a law which required the Secretary of the Interior to propose legislative solutions to all Indian claims that the Secretary decided not to litigate:

> Congress was acutely aware that litigation in many instances would be unfair to third parties who had purchased or inherited their property many years ago without knowledge of the Indian claims. The legislators were also troubled by the serious problem of complicity on the part of the federal government in bringing about many improper transfers and encumbrances of Indian land.

Covelo Indian Community v. Watt, 551 F. Supp. 366, 382 (DC Cir. 1982).

Covelo describes a congressional awareness of how litigation decisions could be unfair to third parties who purchased property without knowledge of Indian treaty claims. *Covelo* also noted that Congress was aware that the United States was complicit in bringing about unfair transfers from Indians. Both of those problems are present here. As demonstrated above, the injunction harms innocent third party landowners. Also, the federal government caused this harm when it transferred ceded land without any warning to the innocent settlers and purchasers that their property may still be subject to some unsettled claims.

Accordingly, this Court should direct that any remedy to enforce the Band's treaty claims must be limited to federal compensation.

II

BALANCING THE EQUITIES COUNSELS AGAINST AN INJUNCTION

Before an injunction can issue, the court must balance the equities between the parties. *Burford v. Sun Oil Company*, 319 U.S. 315, 345 (1943). A principle consideration of whether to grant injunctive relief is "whether the harm to the plaintiff outweighs any harm threatened by the injunction." *Savage Industries, Inc. v. Savage Arms, Inc.*, 43 F.3d 714, 719 n.8 (1st Cir. 1994).

To be sure, courts have issued injunctions after balancing the equities but, even on the few occasions courts have issued injunctive relief to enforce an Indian treaty right, they have still provided equitable protections to those who may be adversely affected. For example, in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 686 (1979), this Court allowed Indian tribes to take only as much fish as necessary to achieve a moderate living.

More recently, the Ninth Circuit in *United States v. State of Washington*, 135 F.3d 618, 640 (9th Cir. 1998), fashioned an injunction to minimize its impact on landowners. The issue was whether specific tribes still had shellfishing rights on state tidelands. The circuit court found rights to exist but still balanced the equities by prohibiting the tribes from benefiting where the landowners had improved the shellfish beds. The *United States v. Washington* court also limited the time, place, and manner of gathering on unimproved beds. However, in this case, the Eighth Circuit employed no equitable considerations. It should have.

A. The Landowners Are Innocent Because the United States Government Represented that the Treaty Rights Are Terminated

Amicus agrees with the state, counties, and landowners that the 1850 Presidential Executive Order and the later 1855 Treaty in which the Chippewa again ceded their lands in exchange for reservation land lawfully terminated the Mille Lacs Band's usufructuary rights. However, even if the order and subsequent treaty did not lawfully terminate those rights, they did have one effect: they created an unmistakable reasonable expectation in the landowners that their lands were free of Chippewa usufructuary rights.

When President Taylor terminated the usufructuary rights in 1850, the United States government had a policy promoting Western settlement and expansion of the nation. Act of Congress, March 3, 1837, 5 Stat. 158, State Appellate Appendix to the Eighth Circuit at 312. In order to promote settlement, all prior claims had to be extinguished so that land could be conveyed to the new settlers. *Id.*

From the 1850's until it took a contrary position in this litigation, the United States government supported this policy and consistently acted as though the Band's usufructuary rights had been terminated. For example, in 1938, President Roosevelt stated that "the hunting, fishing, and gathering privileges guaranteed by the 1837 and 1842 Treaties had been revoked by the 1850 executive order." State Appellate Appendix to the Eighth Circuit at 511.

The record below also shows on many other occasions the United States government expressly told both new settlers and the Chippewa that the hunting and fishing privileges were terminated on ceded lands, and that Chippewa hunting was subject to state law. *See* Opening Brief of Appellant Counties to the Eighth Circuit Court of Appeals at 12-14 and Opening

Brief of Landowner/Appellants John W. Thompson to the Eighth Circuit Court of Appeals at 24.

Consistent with the government's representations, the United States government issued land patents which did not show any reservations of Indian hunting or fishing rights. As the Minnesota Supreme Court has noted,

> patents were granted conveying title to private individuals ... indicat[es] that our government did not construe these treaties as reserving hunting, fishing or any other rights to the Indians.

State of Minnesota v. Keezer, 292 N.W.2d 714, 721 n.10 (Minn. 1980). Thus, the private landowners of ceded Chippewa land are in all respects innocent of any wrongdoing.

B. The Innocent Landowners Reasonably Relied on the Representations of the United States Government and Will Suffer Serious Injury if an Injunction Is Upheld

The landowners heavily relied on the United States' representations. Based upon the expectation that they had clear title to their property, they developed a substantial tourism industry based on hunting and fishing. Landowner's Appendix to the Eighth Circuit at 10948. They invested their lives and money in it.

The record shows that the impact of an injunction on these landowners and the tourism industry is severe. The landowners' economist testified about the extent of the impact on this industry if the Chippewa are given unrestricted hunting rights. He testified that allowing a treaty harvest would cause an annual loss in sales to the tourist industry of $17,310,000 and 863 full-time jobs. Landowner's Appendix to the Eighth

Circuit at 10948. The economist also testified that there would be a $41,290,000 loss in property values. *Id.*

Later, other property owners relied on the United States government's representations and commercially developed their property. For example, some of the landowners developed commercial timber operations. Much of this land is subject to the Minnesota Tree Growth Tax Law. Minnesota Statute § 270.31, *et seq.* Under Section 270.38 subd. 1, a property owner may apply to place his forest land under the Tree Growth Tax Law. The application must agree that

> "while the land is under the tree growth tax law it will be used exclusively for the growing of continuous forest crops in accordance with sustained yield practice and ***will be open to use by the public for hunting and fishing.***"

Id. (emphasis added).

Under the lower court's rulings, Band members may exercise their rights only on public lands and private lands open to public access. Since the forest lands under the Minnesota Tree Growth Tax Law are open to the public, Band members may hunt and fish on them free from state regulations.

When landowners applied to put their property under the Minnesota Tree Growth Tax Law, they did so with the expectation that the public's access for taking fish and game from those lands would be limited by Minnesota wildlife conservation regulations. The landowners did not expect that putting their lands under the Minnesota Tree Growth Tax Law would subject them to unlimited tribal access that could seriously conflict with commercial timber operations. Yet, under the district court's ruling, that is exactly what will happen; these landowners will be unprotected as the state may not limit the Band's access for hunting and fishing.

Why not just remove these lands from the tree growth tax law? In order to take the lands out of the Minnesota Tree Growth Tax Law, the property owners must apply to the local government or the State of Minnesota. ***If*** the application is granted, the property owner will have to pay back taxes and penalties for up to ten years of the time the property was under the Minnesota Tree Growth Tax Law. Thus, landowners with Minnesota Tree Growth Tax Law property can only protect themselves from unregulated hunting access if they pay a substantial penalty. Minnesota Statute § 270.38 subd. 5.

None of these landowners would have invested in their developments had they known that the Chippewa had a right to commercially harvest fish and game on and near their property free of state regulation. Now they are threatened with severe economic hardship because of their reliance on United States government representations and the inaction of the Chippewa. Landowner's Appendix to the Eighth Circuit at 10948. A court of equity should not issue an injunction under these circumstances.

III

THE BAND SHOULD BE BARRED UNDER THE EQUITABLE DOCTRINE OF LACHES FROM ENFORCING ITS USUFRUCTUARY RIGHTS

Under the doctrine of laches, a court should not grant injunctive relief if a party unreasonably delays bringing an action for an injunction and causes prejudice to another party. *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 260-61 (1912). "To prove laches, a party asserting the defense must show (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice." *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1354 (2d Cir. 1991); *Tri-Star Pictures, Inc. v. Leisure Time Productions*,

17 F.3d 38, 44 (2d Cir. 1994) (laches bars injunctive relief where a plaintiff unreasonably delays in commencing an action).

Here, the Band is belatedly claiming a right which it had apparently accepted as no longer existing. For example, the State of Minnesota has been enforcing its fishing and hunting regulations against Band members on ceded lands for more than 100 years. *See* Opening Brief of Landowner/Appellants John W. Thompson to the Eighth Circuit at 4 and 24. Yet the Band did not seek injunctive relief until 1990. It could have done so much earlier. In 1960, the Band made a claim to the Indian Claims Commission for monetary compensation for abrogation of its treaty rights. It received $9,000,000 for the highest and best use of its ceded lands but never raised any arguments for injunctive relief or additional compensation for the usufructuary rights it now claims still to possess. If the $9,000,000 did not compensate for these usufructuary rights, why did the Band fail to seek additional relief?

In reliance on the Band's inaction, Mille Lacs area landowners made substantial commercial and residential investments. For example, they built hunting lodges that must have a reasonable supply of fish and game to attract patrons and survive. The landowners would never have developed their properties in this manner had they known the fish and game could be depleted by the Band. The Band and its members easily could have prevented the landowners' prejudice had they used the Indian Claims Commission opportunity to seek additional compensation or had they brought a separate legal action for enforcement of their treaty rights (if any) prior to private landowners' investments. They never did. Consequently, the Band's action for injunctive relief should

have been, and still should be, dismissed under the laches doctrine.[6]

CONCLUSION

The Eighth Circuit affirmed the district court's injunction against the State of Minnesota preventing it from enforcing its fish and game regulations. This injunction permits members of the Mille Lacs Band of Chippewa Indians to substantially interfere with the property rights of innocent, long-time private landowners in the Mille Lacs area. However, this Court and Congress have recognized that injunctive relief under such circumstances is inappropriate. Therefore, if this Court finds that any treaty rights still exist, it should reverse the

[6] In *United States v. Washington*, 135 F.3d at 637, the Ninth Circuit held that laches cannot apply to defeat Indian treaty rights. The circuit court based its decision on this Court's decision in *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 351 (1939). In *Board of Commissioners,* the United States government asserted an Indian claim against a county government that had improperly collected taxes from the tribe. This Court based its decision on the general unavailability of equitable defenses against the United States finding that, "state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise." In reaching this holding, *Board of Commissioners* relied on *United States v. Minnesota*, 270 U.S. 181. In that case, this Court considered whether an action substantively brought by the tribes rather than by the United States is subject to laches. This Court's implicit conclusion was that if the tribes bring the action, equitable defenses such as laches are available. 270 U.S. at 194-95. Here, the action is substantively brought by the tribe and, accordingly, laches should apply.

Eighth Circuit's approval of injunctive relief and instead direct the Mille Lacs Band of Chippewa Indians to seek compensation from the federal government in the Court of Federal Claims.

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Respectfully submitted,

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